No. 87-1252-CFX
Status: GRANTED

Title: H. J. Inc., et al., etc., Petitioners
v.
Northwestern Bell Telephone Company, et al.

Docketed:
January 20, 1988

Court: United States Court of Appeals
for the Eighth Circuit

Counsel for petitioner: Bedor,Susan

Counsel for respondent: French,John D.

Entry	Date	Note	Proceedings and Orders
1	Jan 20 1988	G	Petition for writ of certiorari filed.
3	Feb 19 1988		Order extending time to file response to petition until March 1, 1988.
4	Feb 29 1988		Brief of respondent Northwestern Bell Telephone Co. in opposition filed.
5	Mar 2 1988		DISTRIBUTED. March 18, 1988
6	Mar 14 1988	X	Reply brief of petitioners H.J. Inc., et al., etc. filed.
7	Mar 21 1988		Petition GRANTED.
			**********
9	Apr 25 1988		Order extending time to file brief of petitioner on the merits until May 19, 1988.
10	May 5 1988		Brief amicus curiae of United States filed.
11	May 18 1988		Brief amici curiae of Arizona, et al. filed.
12	May 19 1988		Brief amicus curiae of Trial Lawyers for Public Justice filed.
13	May 19 1988		Brief of petitioners H.J. Inc., et al., etc. filed.
14	May 23 1988		Joint appendix filed.
15	May 31 1988		Record filed.
		*	Certified copy of original record and proceedings, 2 volumes, received.
18	Jun 6 1988	D	Motion of petitioners for divided argument filed.
17	Jun 7 1988		Order extending time to file brief of respondent on the merits until July 7, 1988.
20	Jun 17 1988		Brief amicus curiae of Chamber of Commerce of the U.S. filed.
19	Jun 20 1988		Motion of petitioners for divided argument DENIED.
21	Jun 30 1988		Brief amicus curiae of American Insstitute of Certified Public Accountants filed.
22	Jul 7 1988		Brief amicus curiae of AFL-CIO filed.
23	Jul 7 1988		Brief amicus curiae of Natl. Assn. of Manufacturers filed.
24	Jul 7 1988		Brief amicus curiae of Washington Legal Foundation filed.
29	Jul 7 1988		Brief of respondent Northwestern Bell Tel. Co. filed.
25	Jul 15 1988	G	Application (A88-41), filed by Petitioners, for an extension of time within which to file a reply brief, submitted to Justice Blackmun.
26	Jul 15 1988	G	Application (A88-42) by Petitioners to file a reply brief in excess of page limits, submitted to Justice Blackmun.
27	Jul 19 1988		Application (A88-41) granted by Justice Blackmun extending the time to file until August 26, 1988.
28	Jul 19 1988		Application (A88-42) granted by Justice Blackmun, allowing a maximum of 30 pages.
30	Aug 12 1988		CIRCULATED.

No. 87-1252-CFX

Entry	Date	Note	Proceedings and Orders
31	Aug 25 1988	X	Reply brief of petitioners H.J. Inc., et al., etc. filed.
32	Aug 29 1988		Set for argument. Tuesday, November 8, 1988. (4th case) (1 hr).
33	Oct 20 1988		Record filed.
34	Nov 8 1988		ARGUED.

87-1259

Supreme Court, U.S.
FILED
JAN 20 1988
JOSEPH F. SPANIOL, JR.
CLERK

No._____

IN THE

Supreme Court of the United States

October Term, 1987

H.J. INC., a Minnesota corporation, KIRK DAHL, LARRY KRUGEN and MARY KRUGEN, individually and d/b/a PHOTO IMAGES, SUSAN DAVIS, ROBERT NEAL, ISAAC H. WARD, RICHARD L. ANDERSON, THOMAS J. MOTT, and all others similarly situated,

Petitioners,

vs.

NORTHWESTERN BELL TELEPHONE COMPANY, a subsidiary of U.S. West, A.B.C. individually and D.E.F. as corporations, and other unnamed Co-conspirators,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

1. Whether petitioners have alleged a "pattern of racketeering activity" under RICO, 18 U.S.C. § 1961-68.

PARTIES TO THE PROCEEDING

The caption of the case in this Court contains the names of all parties to the proceeding in the Eighth Circuit (Supreme Court Rule 21.1(b)).

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2 Civ. RICO Report No. 44 (April 14, 1987) 8

IN THE

Supreme Court of the United States

October Term, 1987

No. _____

H.J. INC., a Minnesota corporation, KIRK DAHL, LARRY KRUGEN and MARY KRUGEN, individually and d/b/a PHOTO IMAGES, SUSAN DAVIS, ROBERT NEAL, ISAAC H. WARD, RICHARD L. ANDERSON, THOMAS J. MOTT, and all others similarly situated,
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vs.

NORTHWESTERN BELL TELEPHONE COMPANY, a subsidiary of U.S. West, A.B.C. individually and D.E.F. as corporations, and other unnamed Co-conspirators,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

OPINIONS BELOW

The opinion of the Eighth Circuit denying rehearing, dated October 23, 1987 is not officially reported. The full opinion, decided September 22, 1987 is officially reported at 829 F.2d 648 (8th Cir. 1987). The opinions of the district court filed November 21, 1986 and February 10, 1987 are officially reported at 648 F. Supp. 419 (D. Minn. 1986).

The Eighth Circuit opinion denying rehearing is reprinted in the Appendix, beginning at A-1. The full opinion, filed September 22, 1987 is reprinted in the Appendix beginning at A-3. The district court decisions filed November 24, 1986 and February 8, 1987 are reprinted in the Appendix at A-25 and A-8 respectively.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and 28 U.S.C. § 2101(c). The judgment denying rehearing of the Court of Appeals for the Eighth Circuit was entered on October 23, 1987. This Petition is timely, having been filed within ninety (90) days of that date.

PROVISIONS OF STATUTE INVOLVED

The statutory provisions of Title 18, United States Code, added by Title IX (RICO) of P.L. 91-452, in relevant part, provides:

§ 1961. Definitions.

As used in this chapter—

(1) "racketeering activity" means . . . any act which is indictable under any of the following provisions of title 18, United States Code: . . . section 1341 (relating to mail fraud), section 1343 (relating to wire fraud) . . . section 1951 (relating to . . . extortion) . . . section 2314 . . . (relating to interstate transportation of stolen property) . . .

* * *

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period

of imprisonment) after the commission of a prior act of racketeering activity;

§ 1962. Prohibited activities.

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

. . .

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections . . . (c) of this section.

The relevant statutory provisions contained in Volume 84 of the *Statutes at Large* at 947 provides:

Section 904. (a) The provisions of this title shall be liberally construed to effectuate its remedial purposes.

(b) Nothing in this title shall supersede any provision of Federal, State, or other law imposing criminal penalties or affording civil remedies in addition to those provided for in this title.

STATEMENT OF THE CASE

A. Proceedings and Disposition Below.

This is a class action arising under the Racketeering Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §1961-1968. Petitioners filed and served their Summons and Complaint on July 8, 1986. Plaintiffs' First Amended Complaint was filed and served on July 15, 1986. Petitioners alleged that respondents committed acts in violation of 18 U.S.C. §§1962(a), (b), (c) and (d). In addition to federal claims, petitioners alleged state law violations pursuant to the court's pendant jurisdiction which consisted of acts of bribery and contravention of Minn. Stat. §609.42, subd. 1(1) and (2) and common law bribery.

Oral arguments were heard in the district court on October 1, 1986. By Order dated November 21, 1986, the court granted defendant Northwestern Bell Telephone Company's (Northwestern Bell) motion to dismiss the Complaint in its entirety on the grounds that the plaintiffs had failed to allege a "pattern" of racketeering activity and, on the 1962(a) count, the fact that there was no person/enterprise distinction. In addition, the court found that under the "filed rate" doctrine, plaintiffs' cause of action was not federally cognizable.

Petitioners filed a motion to amend or reconsider on December 3, 1986. On February 10, 1987, the District Court denied the Motion to Reconsider. Petitioners appealed to the Eighth Circuit on March 20, 1987. Oral arguments were heard in the 8th Circuit on September 2, 1987 and the Opinion was

filed on September 22, 1987, affirming the trial court's dismissal of petitioner's Complaint in that petitioner's had failed to allege a RICO pattern of racketeering activity. On October 23, 1987, petitioners petition for rehearing en banc, filed October 4, 1987 was denied. Petitioners now seek certiorari.

B. Factual Allegations.

Unlike many RICO claims, this case does not involve "garden variety" fraud allegations. Petitioners allege that from January 1, 1980 through the present Respondent Northwestern Bell conducted a number of schemes in which it attempted to, or did, bribe commissioners of the Minnesota Public Utilities Commission. These bribes included the payments of over a hundred thousand dollars to commissioners. In one of these schemes payments were made through a middle man, and were hidden in the defendant's records as "attorney fees." In another scheme employment negotiations took place with a sitting commissioner resulting in over $100,000.00 in "consulting fees" within a year after leaving the commission. In another scheme, parties, gifts, and meals were paid by respondent for commissioners, the frequency of which rose dramatically during critical votes on rate increases; these votes resulted in increases well beyond the amounts recommended by administrative law judges. Despite the pleading of these and other schemes, district and circuit courts found that only one scheme existed; and that more than one scheme was necessary for a pattern.

Petitioners seek to recover compensatory damages and allege that the compensation Northwestern Bell received was excessively unfair and unreasonable. These excessive charges were caused by the involvement of bribery, attempts to bribe, conspiracy and the other racketeering activities alleged. Petition-

ers also seek, as a class action interest, reasonable attorneys fees, punitive and treble damages. Petitioner also applied for an injunction preventing respondents from engaging in further illegal activity and other relief as the Court deems just and proper.

REASONS FOR GRANTING THE WRIT

In order to establish a RICO cause of action, four elements must be proven. These elecents are 1) conduct, 2) of an enterprise 3) through a pattern 4) of racketeering activity. *Sedima, S.P.R.L. v. Imrex Company, Inc.*, 473 U.S. 479 (1985). Of these elements, at issue in the case at bar is whether petitioners' Complaint satisfies an essential element of the civil RICO cause of action by showing that the defendants had engaged in a pattern of racketeering activity. Under RICO, a pattern "requires at least two acts of racketeering activity, one of which occurred after the effective date of this Chapter and the last of which occurred within 10 years . . . after the commission of a prior act of racketeering activity. . . ." 18 U.S.C. §1961(5). In *Sedima*, this Court indicated that in order for there to be a pattern, there must be a factor of "continuity plus relationship." This Court in dicta stated:

> As many commentators have pointed out, the definition of a "pattern of racketeering activity" differs from the other provision in §1961 in that it states that a pattern "*requires* at least two acts of racketeering activity," § 1961(5) (emphasis added), not that it "means" two such acts. The implication is that while two acts are necessary, they may not be sufficient. Indeed, in common parlance two of anything do not generally form a "pattern". The legislative history supports the view that two isolated acts of racketeering activity do not constitute a

> pattern. As the Senate Report explained: "This target of [RICO] is thus not sporadic activity. This infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective. It is this factor of *continuity plus relationship* which combines to produce a pattern." S. Rep. No. 91-617, p. 158 (1969) (emphasis added).

Id. at 496, n. 14.

Footnote 14 has been used to fashion a definition of the term "pattern." However, by focusing on the wording "continuity plus relationship", courts have arrived at extremely different interpretations of whether a pattern exists. Courts have created three approaches in defining a pattern for RICO purposes. These are the "liberal approach," the "restrictive view" and the "moderate" or "flexible view." *Lawaetz v. Bank of Nova Scotia*, 653 F.Supp. 1278, 1285-86 (D. Virgin Islands 1987). *See also* Alexia Morrison, *RICO's "Pattern" Requirement: Where the Lexicon Went Wrong* 3 Civil RICO Report No. 27 at 7 (Dec. 8, 1987). (Defines approaches by court at the "expansive view," the "narrow view" and the "middle road.") In *Morgan v. Bank of Waukegan*, 804 F.2d 970, 974 (7th Cir. 1986), the court noted that the pattern requirement in the aftermath of footnote 14 of *Sedima* has created a conflict among the circuit courts.

This conflict has led to chaos in interpretations of RICO. None of the opinions of the circuit or district courts which endorse differing approaches can be reconciled. Although *Sedima* rejected attempts to limit the scope of RICO, *Id.*, the federal courts have viewed footnote 14 as a signal to fashion a limiting construction around the pattern requirement. *Barticheck v. Fidelity Union Bank/First National State*, 832 F.2d 36, 38 (3rd Cir. 1987). Indeed, 58.6% of the reported decisions

since *Sedima* have dismissed civil RICO complaints on various defendant motions. Of these decisions, 40.4% were dismissed due to conflicting definitions of pattern. 2 Civil RICO Report No. 44 at 7 (April 14, 1987).

Circuit court interpretations have not only caused conflict among the circuits but have also led to specific rejection of the approach of the Eighth Circuit which falls under the "restrictive" or "narrow" view. It is clear that in those courts which have rejected the Eighth Circuit's approach, the instant case would survive a RICO pattern challenge and Petitioners would be allowed to proceed with their claim. Petitioners therefore request that this Court resolve the conflict among the circuits in their interpretation of the RICO pattern requirement and reject the Eighth Circuit's scheme requirement.

I. CERTIORARI SHOULD BE GRANTED BECAUSE A CONFLICT EXISTS AMONG THE CIRCUITS REGARDING THE INTERPRETATION OF THE RICO PATTERN REQUIREMENT, THE CONSEQUENCE OF WHICH IS UNEQUAL TREATMENT OF RICO PLAINTIFFS.

A. Circuit courts have developed three approaches to the pattern requirement.

As previously stated, although *Sedima* did not directly address the definition of pattern for RICO purposes, in footnote 14 this Court laid groundwork for the Circuit and District courts to interpret this pattern requirement. Since *Sedima*, three approaches have evolved in interpreting the pattern requirement causing pronounced conflict among the circuit decisions. These approaches have been identified as the "liberal" or "expansive view," the "restrictive view" or "narrow view," and the "moderate view" or "middle road view." See,

Lawaetz, 653 F.Supp. 1278, 1285-86 (D. Virgin Islands 1987); *Morrison*, 27 Civil RICO Report at 7 (Dec. 8, 1987). A review of these three approaches will demonstrate the opposite views that courts have taken.

1. The expansive or liberal view.

The most liberal approach has held that two related acts constitute a pattern when committed in furtherance of a single episode or a scheme. *Lawaetz*, 653 F. Supp. at 1286. Typical of this view is *United States v. Ianniello*, 808 F.2d 184, 192 (2d Cir. 1986) where the court held that "when a person commits at least two acts that have the common purpose of furthering a continuing criminal enterprise with which that person is associated, the elements of relatedness and continuity which the *Sedima* footnote construes §1962(c) to include are satisfied." *See also, Bank of America Nat'l Trust and Savings Ass'n v. Touche Ross and Co.*, 782 F.2d 966, 971 (11th Cir. 1986) (nine acts of wire and mail fraud involving same parties over a period of three years sufficient to satisfy the pattern requirement); *R.A.G.S. Couture Inc. v. Hyatt*, 774 F.2d 1350 (5th Cir. 1985) (two related acts of mail fraud are sufficient to form a pattern).

2. The restrictive or narrow view.

The restrictive view holds that a pattern must be comprised of multiple separate criminal "schemes" or "episodes." *Lawaetz*, 653 F.Supp. at 1286. The 8th Circuit has noted that *Sedima* requires a showing of relationship plus continuity. The relationship prong is met when two or more racketeering acts are committed in pursuit of the same scheme. *See, Superior Oil Co. v. Fulmer*, 785 F.2d 252, 257 (8th Cir. 1986). The District and Circuit court in the instant case found that the relationship prong had been met. However in order to estab-

lish a pattern, the continuity prong must also be proven. It is the continuity portion of the pattern requirement that the Eighth Circuit found was lacking in appellants' complaint. In order to demonstrate the necessary continuity, the Eighth Circuit has found that a plaintiff must show that the defendant "had engaged in similar endeavors in the past or that [it was] engaged in other criminal activities." *H.J. Inc. v. Northwestern Bell*, 829 F.2d 648, 650 (8th Cir. 1987), *quoting Deviries v. Prudential-Bache Securities, Inc.*, 805 F.2d 326, 329 (8th Cir. 1986). The court noted that one fraudulent effort or scheme was insufficient to show a pattern. *See, Id.*

3. The flexible or middle road approach.

The flexible or middle road approach involves the analysis of a number of factors to determine whether a pattern has been alleged. "The key is to plead a persistent course of conduct and either a single ongoing scheme or multiple episodes may suffice if these acts are also related." *Lawaetz*, 653 F.Supp. at 1287 (citations omitted). The factors that are to be considered include the number and variety of the predicate acts, the number of victims of the alleged activity, the length of time of the activity, the number of participants in the alleged crime, the occurrence of distinct injuries, the purpose of the criminal activity, the result of the criminal activity, the number of transactions, and whether the scheme is ongoing and open-ended. *See, Id.* at 1286; Morrison, 23 Civil RICO Report at 8. Indeed, Morrison has suggested that the factors enumerated in this approach "mirror those of *Sedima's* footnote 14, which is based on the 'pattern' definition found in 18 U.S.C. §3575(e)." Morrison, 23 Civil RICO Report at 8.

In attempting to define pattern then, the circuit and district courts have evolved three separate versions of the pattern requirement. In doing so courts have not just implemented

their own interpretation of the pattern requirement, but have severely criticized other circuits' opinions. Especially criticized has been the Eighth Circuit's approach.

B. The Eighth Circuit's "multiple scheme requirement" is in conflict with *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985), with the RICO statute itself, and with other circuit and district courts decisions, and should be reversed.

The First, Second, Third, Seventh and Ninth Circuits have specifically criticized and rejected the Eighth Circuit's multiple scheme test under RICO. District courts from the Third, Fourth and Fifth Circuit have also followed suit. Their criticism is that the Eighth Circuit's requirement is in conflict with *Sedima*, with the RICO statute itself, with legislative intent, and that the results under a multiple scheme test are contrary to the goals of the statute.

One of the most recent cases to discuss the RICO pattern requirement in relation to the Eighth Circuit is *Sun Savings and Loan Ass'n v. Dierdorff*, 825 F.2d 187 (9th Cir. 1987). In discussing the positions taken by post- *Sedima* courts, it characterized the Eighth Circuit as holding that a series of predicate acts related to one fraudulent scheme or criminal episode would not constitute a pattern. *Id.* at 192, *citing Superior Oil Company v. Fulmer*, 785 F.2d 252, 257 (8th Cir. 1986) *Dierdorff* also took note that the Seventh and Eleventh Circuits have held that a series of predicate acts related to one fraudulent scheme or criminal episode may constitute a pattern, but the predicate acts must be "continuous." *Id.* The court then stated: "We agree with the Seventh and Eleventh Circuits that it is not necessary to show more than one fraudulent scheme or criminal episode to establish a pattern under *Sedima*." *Id.* at 193. It further stated that there is "no sound basis for the

view taken by some courts that a pattern requires more than one 'fraudulent scheme' or 'criminal episode'." *Id.* The court found that requiring a plaintiff to show that the predicate acts are somehow both related and again sufficiently unconnected in time was not supported by the language in RICO itself nor in *Sedima*: "Requiring temporal unconnectedness, i.e., separate acts, makes sense, but neither RICO's language nor *Sedima's* interpretation of it supports a requirement of substantive unconnectiveness, i.e., separate episodes or schemes." *Id.* (footnote omitted). The court further went on to note that the effects of requiring such a balance would only "forestall RICO claims that are legitimate under the RICO Act itself, it's legislative history, and the Supreme Court's interpretation of the Act." *Id.* at 194.

The First, Third and Seventh Circuits have also explicitly rejected the Eighth Circuit's multiple episode test. See, *Roeder v. Alpha Industries, Inc.*, 814 F.2d 22, 31 (1st Cir. 1987) ("We decline to adopt a definition of pattern that relies solely on whether activity can be classified as a single scheme or episode."); *Barticheck v. Fidelity Union Bank/First National State*, 832 F.2d 36, 39 (3rd Cir. 1987) (rejecting position that a RICO pattern must involve at least two distinct schemes in that it would exempt those who engage in only one unlawful scheme which is contrary to the purposes of the statute); *Morgan v. Bank of Waukegan*, 804 F.2d 970, 975 (7th Cir. 1986) ("the proposition that the predicate acts must always occur as part of separate schemes in order to satisfy the continuity aspect of the pattern requirement focuses excessively on continuity, and therefore cannot be accepted as a general rule.")

The Second Circuit in *United States v. Ianniello*, 808 F.2d 184 (2nd Cir. 1986) has also criticized pattern requirement adopted by the Eighth Circuit. The *Ianniello* court cited

Superior Oil v. Fulmer in discussing that the Eighth Circuit required as part of its definition of pattern proof that the defendants engaged in more than one scheme. The court concluded that "forcing such a result from the word 'pattern' is a strained and inappropriate reading of the statutory language." *Id.* at 192. It also felt that requiring multiple schemes would undercut § 1962(b). Provision 1962(b) prohibits predicate acts that are aimed at taking over an enterprise rather than focusing on an enterprise that is committing predicate acts. *Id.* The court stated that if two schemes were required as part of the definition of pattern under §1961(5), it would effectively eliminate §1962(b). *Id.* The court therefore declined to accept such an "incongruous result" and held that when a person commits at least two acts having a common purpose of furthering a continuing criminal enterprise the elements of relativeness and continuity required by *Sedima* are satisfied.

The *Ianniello* court also noted that the multiple scheme requirement was neither grounded in the statutory language of RICO nor was there any clear legislative history to indicate that, for example, because mail fraud is listed as a predicate act, it means only "scheme like" fraud. *Id.* at n.16. The court felt that imposing such an element "violates the Supreme Court's admonition against adding requirements not grounded in the statute or the legislative history." *Id.*

The Eleventh Circuit, in addition to the First, Second, Third, Seventh and Ninth Circuits, is also in conflict with the Eighth Circuit's pattern requirement. In *Bank of America v. Touche Ross and Co.*, 782 F.2d 966 (11th Cir. 1986) the Eleventh Circuit rejected the proposition that the predicate acts must occur in different criminal episodes or schemes in order to satisfy the pattern requirement. Therefore, the First, Second, Third, Seventh, Ninth and Eleventh Circuits are all

therefore in conflict with the Eighth Circuit in its interpretation of the pattern requirement in a RICO claim.

In addition to the Circuit courts, district courts from the Third, Fourth and Fifth Circuits have also criticized the Eighth Circuit's scheme requirement. In *Lawaetz v. Bank of Nova Scotia*, 653 F.Supp. 1278 (D. Virgin Islands 1987), the court rejected the Eighth Circuit's requirement for pattern as "legally unsupportable" stating that "RICO's language and legislative history are devoid of a multiple episode requirement." *Id.* at 1286. It also cited *Sedima* for the view that it "admonishes against placing reactionary judicial restrictions on civil RICO plaintiffs" and that the RICO statute must be liberally construed in order to effectuate its remedial purposes. *Id.* at 1286-87.

Similarly, in *United States v. Madeoy*, 652 F.Supp. 371 (D.D.C. 1987), the Eighth Circuit's multiple scheme test as enunciated in *Superior Oil v. Fulmer* was rejected. The court found that a single conspiracy or scheme may also constitute a pattern of racketeering activity. *Id.* at 379. The court reached this conclusion after reviewing the relevant authorities and evaluating the underlying reasoning.

In *Louisiana Power and Light v. United Gas Pipe Line*, 642 F. Supp. 781 (E.D. La. 1986), *Superior Oil* was also cited in a discussion of the positions courts have taken regarding the RICO pattern requirement. The *Louisiana Power* court felt that the interpretation of the statute posed by *Superior Oil* was clearly wrong. The court criticized the result of the requirement of multiple criminal schemes; that is that a defendant who committed a series of acts in furtherance of a single criminal scheme could not be sued for RICO damages. *Id.* at 808. The court also stated:

> The problem I find in these cases is that to require the plaintiff to prove multiple schemes narrows the reach of the statute too far. The *Fulmer* case would require a plaintiff to prove that the defendant had defrauded or intended to defraud not only the plaintiff but others as well. *Fulmer*, at 257. But surely the plaintiff would not have standing to investigate or raise the issue of criminal activities which injure others. Such conduct neither damages nor threatens the plaintiff, and so, is simply not relevant to the plaintiff's suit. And if the plaintiff has no standing to raise the issue, it will never be able to make out a RICO claim under *Fulmer*, because it will never have the opportunity to prove the defendant's criminal injury of third parties. I refuse to place the RICO plaintiff in such a Catch-22.

Id. at 808-09.

It is clear that the circuit and district courts are not just divided in their definition of pattern, but are in totally opposite and irreconcilable positions. This places RICO plaintiffs in the untenable situation of having their RICO claim upheld not based on its merits, but based on the jurisdiction within which it is brought. This is made more clear in the instant case where almost any circuit other than the Eighth would not have dismissed appellants' complaint.

C. Petitioner's Complaint would be upheld in other circuits.

It is clear that under the views discussed other than the narrow view, petitioner's complaint would have withstood a RICO pattern challenge. Case law in the Second, Third, Fifth, Seventh, Ninth, and Eleventh Circuits indicate the plaintiffs would have been allowed to proceed with their complaint.

In *United States v. Ianniello*, 808 F.2d 184 (2d Cir. 1986), the court rejected the Eighth Circuit's multiple scheme ap-

proach and held that "when a person commits at least two acts that have the common purpose of furthering a continuing criminal enterprise with which that person is associated, the elements of relatedness and continuity which the *Sedima* footnote construes §1962(c) to include are satisfied." *Id.* at 192. *Barticheck v. Fidelity Union Bank/First National State*, 832 F.2d 36 (3rd Cir. 1987) upheld a complaint where two acts of mail fraud were alleged. The court specifically rejected the Eighth Circuit's multiple "scheme" requirement, noting that the term "scheme" is difficult to define and that a rule requiring multiple schemes would exempt defendants from RICO liability who engaged in one scheme, no matter how extensive or injurious. *Id.* at 39. In *R.A.G.S. Couture, Inc. v. Hyatt*, 774 F.2d 1350 (5th Cir. 1985), the court found that the two alleged acts of mail fraud were related and therefore constituted a pattern. *Id.* at 1355. Here, where over thirty acts are alleged, there is no doubt that in the Second, Third and Fifth Circuits, Appellants' Complaint would stand.

Similarly, in *Morgan v. Bank of Waukegan*, 804 F.2d 970 (7th Cir. 1986), plaintiffs had alleged that defendants committed several acts of mail fraud over a period of several years in furtherance of an overall scheme to defraud the plaintiffs. The court found that these acts were distinct, some related to two separate foreclosure sales that occurred two years apart while others related to fraudulent statements made in connection with the initial loan transaction. The court found that under the facts, plaintiffs had satisfied both the continuity and relation aspects of the pattern requirement stating that although the acts could be viewed as part of a grand single scheme, they were also ongoing over a period of nearly four years. *Id.* at 976. In *Sun Savings and Loan Association v. Dierdorff*, 825 F.2d 187 (9th Cir. 1987), a savings and loan brought an action against its former president, alleging that

defendant had written four letters to various entities to cover up a scheme of receipt of kickbacks from Sun's customers. The court found that such activity satisfies the pattern requirement. Finally, in *Bank of America v. Touche Ross & Co.*, 782 F.2d 966 (11th Cir. 1986), the court found that under *Sedima* the pattern requirement was satisfied where the banks alleged nine separate acts of wire and mail fraud involving the same parties over a period of three years the purpose of which was to induce the banks to extend credit to International Horizons. *Id.* at 971. These cases indicate that the facts in the case at bar constitute a sufficient pattern under RICO in the Second, Third, Fifth, Seventh, Ninth and Eleventh Circuits.

Petitioners' complaint alleged a number of separate bribery actions by respondent Northwestern Bell with Commissioners of the Minnesota Public Utilities Commission. These acts were ongoing over a period of two to three years involving different commissioners, different perpetrators and different racketeering acts. Thus, in six circuits other than the Eighth Circuit, petitioner's case would not have been dismissed. In addition, other circuits have criticized the position of the 8th Circuit and rejected the multiple scheme test. This Court must therefore redefine the pattern requirement in order to promote uniformity of application to all RICO plaintiffs.

II. THIS COURT SHOULD REDEFINE AND STANDARDIZE THE PATTERN REQUIRED UNDER RICO IN ORDER TO ENSURE THAT CRIMINAL PROSECUTIONS ARE NOT DISMISSED.

In addition to civil penalties, RICO also authorizes criminal sanctions. RICO is considered to be the prosecutors' main weapons in organized crime, political corruption, white collar

crime, and terrorism prosecutions. Oversight on Civil RICO Suits: *Hearings before the Senate Judiciary*, 99th Cong., 1st Sess. 106, 109-11 (1985) (testimony of Assistant Attorney General Steven Trott). Because of varying interpretations of the pattern requirement in the circuit courts, however, prosecutors will face the probability that criminal RICO defendants will be relieved of criminal liability under the statute. Prosecutors and defense counsel, as well as civil litigators, need authoritative guidance from this Court to bring order out of the conflicting interpretations and ensure that RICO is given its proper place in prosecuting criminal defendants.

The probability of dismissal of RICO criminal defendants is no more readily apparent than in the Eighth Circuit. In the recent case of *United States v. Kragness*, 830 F.2d 842 (8th Cir. 1987), the defendants were tried on a 13 count indictment. Count I alleged a RICO conspiracy charging that the defendants conspired to conduct or participate in the conduct of a drug enterprise's affairs through a pattern of racketeering activity. Count II charged the defendants with conducting or participating in the conduct of a drug enterprise's affairs through a pattern of racketeering activity. The other counts involved conspiracy to import marijuana, conspiracy to distribute marijuana, conspiracy to import and distribute cocaine and quaaludes, traveling in interstate commerce to promote unlawful activity, possession with intent to distribute cocaine, using a telephone to facilitate marijuana exportations and distribution, interstate travel to promote marijuana exportation and distribution, transportation of Canadian currency to the United States without reporting it, and conspiracy to obstruct the Internal Revenue Service in the collection of taxes. *Id.* at 853. The court found that a pattern of racketeering activity did exist even under the Eighth Circuit restrictive view:

> Here we think it clear that even our more restrictive view of the pattern requirement has been met, for there is evidence of not two but three separate schemes: first, there was a scheme to import marijuana into La Junta; second, there was a cocaine-and-quaalude scheme; and third, there was a scheme to import marijuana into the Phoenix area.

Id. at 858. The *Kragness* court found liability under the RICO statute. However, it is clear that had there only been one scheme to sell only one drug, to import marijuana for example, these defendants would not have been subject to RICO liability despite repeated criminal acts to further that scheme. No doubt, the *Kragness* case will limit the application of criminal RICO in the Eighth Circuit.

This is even more clear in view in context with the current case. Respondents here have not been criminally indicted. However, the Eighth Circuit has found that there was only one scheme—that of attempting to bribe the Minnesota Public Utilities Commission. Petitioners alleged numerous individual acts of bribery. However, it is clear that if the criminal indictments were ever made in this case, under *Kragness*, none of the respondents would be subject to RICO criminal liability. Any jurisdiction following the view of the Eighth Circuit will be faced with the same dilemma.

The RICO statute must be read to include not only the civil, but also the criminal sanctions. Even if the courts chose to make a distinction between the civil and criminal standards for a RICO pattern, this would not be allowable. Criminal defendants would surely protest such a distinction on constitutional grounds because of the conflicting applications of RICO. Therefore the Eighth Circuit cannot ignore the fact that the meaning of the term "pattern" must be the same in both civil

and criminal proceedings. *See, Northern Securities Company v. United States*, 193 U.S. 197, 401 (1904) (Holmes, J. dissenting) ("The words cannot be read one way in a suit which is to end in fine and imprisonment and another way in one which seeks an injunction.").

It is clear that guidance from this Court is needed to ensure an even application of the RICO pattern requirement in all criminal and civil proceedings. This is especially true if this Court wishes prosecutors to retain a valuable tool in fighting crime.

III. A DECISION ON THE RICO PATTERN WOULD HAVE NATIONAL SIGNIFICANCE ON BOTH THE FEDERAL AND STATE LEVELS.

This Court should define a single standard for interpretation of the RICO pattern requirement. Such a decision will have an effect on both the federal and state levels. In federal courts, the federal RICO interpretation for the RICO pattern requirement has been applied to state RICO or other similar state statutes without discussion of the state's statutory intent or purpose. For example, in *Mills v. Fitzgerald*, 668 F.Supp. 1554 (N.D.Ga. 1987), an action was brought under the federal RICO act as well as under the Georgia Racketeer Influenced Corrupt Organizations Act. The action was based on misrepresentations of fact, fraud and inducement to buy interests in limited partnership. The court dismissed the claim on pattern grounds. It applied the Eleventh Circuit pattern requirement, stating that the Georgia RICO act contained "substantially the same language" as the federal RICO statute. *Id.* at 1561. The court noted that the Georgia RICO statute considered violations of the "Georgia Securities Act of 1973" predicate acts. Such acts are not enumerated under the federal RICO statute, and the court did not discuss these violations in relation to the

pattern requirement contained in the Georgia RICO Act, although the plaintiffs complaint alleged "federal and Georgia securities fraud." *Id.* at 1561.

Similarly in *Behunin v. Dow Chemical Co.*, 650 F.Supp. 1387 (D. Colo. 1986), the court dismissed plaintiff's RICO action upon the finding that there was only one scheme. The court found that the Colorado Organized Crime Control Act, Colo. Rev. Stat. §18-17-104 was modeled after federal RICO, and contained a pattern requirement. In spite of the fact that Colorado courts had not yet construed the pattern requirement, the *Behunin* court found the requirement was the same as the federal requirement and dismissed the claim accordingly. *Id.* at 1390.

Other courts have not discussed whether the state court has had an opportunity to interpret their own statutes but have simply found that the two acts were to be interpreted in the same manner. *See, Environmental Tectonics Corp. International v. W. S. Kirkpatrick & Co.*, 659 F.Supp. 1381, 1391 n.8 (D.N.J. 1987) (provisions of New Jersey Act to be interpreted in same way as federal RICO act); *Cook v. Zions First National Bank*, 645 F.Supp. 423, 427 (D. Utah 1986) (Utah Racketeering Influences and Criminal Enterprise Act (RICE) Utah Code Ann. §76-10-1603 and RICO not aimed at type of activity enumerated in plaintiff's complaint); *Schnitzer v. Oppenheimer & Co., Inc.*, 633 F.Supp. 92, 99 (D.Or. 1985) (court interpreted Oregon RICO in same fashion as federal RICO and dismissed claim).

An interpretation and definition of the pattern requirement under RICO by this Court will have national significance on both the federal and state level. This Petition provides the opportunity for this Court to ensure a uniform application of RICO at all levels of the judiciary.

CONCLUSION

Resolution of the foregoing problems is needed by this Court. The instant case is an ideal case to effectuate that resolution. This, unlike many RICO actions, is not a garden variety fraud case—rather it involves most serious allegations of bribery of governmental officials. These acts of bribery involve different people, different times, and had different objectives. This Court must once again restore a rule of law to the RICO statute. Only by so doing will the current rule of confusion be ended.

Dated: January 20, 1988

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
District of Minnesota
Fourth Division

No. 4-86 Civ 546
Clerk's Notice under
Rule 77(d) F. R. Civil Procedure

H.J., INC., et al.,
Appellants-Plaintiff,
vs.
NORTHWESTERN BELL, et al.,
Appellees-Defendant.

You are hereby notified that in the above-entitled cause, on the 12th day of Nov., 1987.

We filed,

CERTIFIED COPY OF MANDATE FROM THE UNITED STATES COURT OF APPEALS, EIGHTH CIRCUIT

CERTIFIED COPY OF JUDGMENT THAT: After consideration, it is ordered and adjudged that the judgment of the district court in this cause be affirmed in accordance with the opinion of this Court.

FRANCIS E. DOSAL, Clerk
By: S.J.L.
Deputy Clerk

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APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 87-5121MN

H. J. INC., etc., et al.,

Appellants,

vs.

NORTHWESTERN BELL TELEPHONE COMPANY, etc., et al.,

Appellees.

Appeal from the United States District Court for the District of Minnesota.

Appellants' petition for rehearing en banc has been considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

October 23, 1987

Order entered at the Direction of the Court:
Robert D. St. Vrain
Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 87-5121

H. J. INC., a Minnesota corporation, KIRK DAHL, LARRY KRUGEN and MARY KRUGEN, individually and d/b/a PHOTO IMAGES, SUSAN DAVIS, ROBERT NEAL, ISSAC H. WARD, RICHARD L. ANDERSON, THOMAS J. MOTT, and all others similarly situated,

Appellants,

v.

NORTHWESTERN BELL TELEPHONE COMPANY, a subsidiary of U. S. WEST, A.B.C. individually and D.E.F. as corporations, and other unnamed co-conspirators,

Appellees.

Appeal from the United States District Court for the District of Minnesota.

Submitted: September 2, 1987
Filed: September 22, 1987

Before McMILLIAN, Circuit Judge, HENLEY, Senior Circuit Judge, and JOHN R. GIBSON, Circuit Judge.

HENLEY, Senior Circuit Judge.

Plaintiffs appeal from the district court's[1] order dismissing their complaint for failure to state a claim upon which relief could be granted. Fed. R. Civ. P. 12(b)(6); *H. J. Inc. v. Northwestern Bell Telephone Co.*, 648 F.Supp. 419, 430 (D. Minn. 1986). Appellants' complaint alleged, *inter alia*, violations of the Racketeer Influenced and Corrupt Organizations Act. 18 U.S.C. §§ 1961-68 (RICO). We affirm.

Because appellants' complaint was dismissed pursuant to Rule 12(b)(6), we view the facts alleged in their complaint in the light most favorable to them. *Bennett v. Berg*, 685 F.2d 1053, 1057-58 (8th Cir. 1982), *cert. denied*, 464 U.S. 1008 (1983). The gravamen of appellants' complaint is that appellee Northwestern Bell Telephone Company undertook to illegally influence members of the Minnesota Public Utilities Commission (MPUC), the state regulatory body responsible for determining the rates which Northwestern Bell may charge. Appellants claim that Northwestern Bell sought to influence individual MPUC commissioners by various methods including cash gifts, employment offers, tickets to sporting and cultural events, airline tickets, meals and parties. Appellants allege a series of episodes beginning in 1980 and claim the practices continue through the present. The district court dismissed appellants' RICO claims for failure to allege a pattern of racketeering activity. *H. J. Inc.*, 648 F.Supp. at 423-26.

The core requirement for a RICO violation is a pattern of racketeering activity. 18 U.S.C. § 1962. *See, Sedima, S.P.R.L. v. Imex Co.*, 105 S.Ct. 3275, 3287 (1985). At the minimum, at

[1] The Honorable Harry H. MacLaughlin, United States District Judge, District of Minnesota.

least two acts of racketeering activity[2] are required to establish a pattern. *Sedima*, 105 S.Ct. at 3285 n.14. However, "while two acts are necessary, they may not be sufficient. Indeed, in common parlance two of anything do not generally form a 'pattern.'" *Id.* Prior to *Sedima* the pattern requirement could be met by simply pleading two acts of racketeering activity. *See, Superior Oil Co. v. Fulmer*, 785 F.2d 252, 255-56 (8th Cir. 1986). In *Sedima* the Supreme Court chastised Congress and the courts for failing to develop a workable definition of "pattern" which would limit the abuse of civil RICO. *Sedima*, 105 S.Ct. at 3287. Accordingly, this circuit has undertaken more meaningfully to construe the concept of "pattern."

We have followed the *Sedima* Court's intimations and have required the combination of continuity plus relationship to establish the necessary pattern. *Superior Oil*, 785 F.2d at 257. *See Holmberg v. Marrisette*, 800 F.2d 205, 209-10 (8th Cir. 1986), *cert. denied*, 107 S.Ct. 1953 (1987). "The term 'pattern' itself requires the showing of a relationship. . . . So, therefore, proof of two acts of racketeering activity, without more, does not establish a pattern. . . ." 116 Cong. Rec. 18940 (1970) (statement of Sen. McClellan), *quoted in Sedima*, 105 S.Ct. at 3285 n.14. The relationship prong is met when two or more racketeering acts are shown to be in pursuit of the same overarching scheme. *See Holmberg*, 800 F.2d at 210; *Superior Oil*, 785 F.2d at 257. The district court found that appellants' complaint satisfied the relationship prong. *H. J. Inc.*, 648 F.Supp. at 425. We agree.

The burden of establishing the continuity prong has proven more onerous. "The target of [RICO] is . . . not sporadic activity. The infiltration of legitimate business normally re-

[2] "Racketeering activity" has been defined to include a broad range of criminal offenses. 18 U.S.C. § 1961(1).

quires more than one 'racketeering activity' and the threat of continuing activity to be effective. It is this factor of continuity plus relationship which combines to produce a pattern." S. Rep. No. 91-617, p.158 (1969), *quoted in Sedima*, 105 S.Ct. 3285 n.14. In order to demonstrate the necessary continuity appellants must allege that Northwestern Bell "had engaged in similar endeavors in the past or that [it was] engaged in other criminal activities." *Deviries v. Prudential-Bache Securities, Inc.*, 805 F.2d 326, 329 (8th Cir. 1986). A single fraudulent effort or scheme is insufficient. *Id. See also Ornest v. Delaware North Cos.*, 818 F.2d 651, 652 (8th Cir. 1987) (single scheme over eight years to defraud plaintiffs of sales commissions); *Madden v. Gluck*, 815 F.2d 1163, 1164 (8th Cir. 1987) (defendant engaged in a vast array of fraudulent activities in pursuit of a single goal to keep a company afloat in order to loot it). Appellants' complaint alleges no more than a series of fraudulent acts "committed in furtherance of a single scheme to influence MPUC commissioners. . . ." *H. J. Inc.*, 648 F.Supp. at 425.

The district court did not err in finding that appellants' complaint failed to satisfy the continuity prong as articulated in this circuit.[3] Therefore, because dismissal was appropriate under Rule 12(b)(6), we do not address the other issues raised in this appeal. The decision of the district court is affirmed.[4]

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[3] We are aware that our continuity plus relationship approach to the pattern requirement is not without criticism. *See Sun Savings & Loan Association v. Dierdorff*, No. 86-5811, 56 U.S.L.W. 2110 (9th Cir. Aug. 7, 1987); *United States v. Ianniello*, 808 F.2d 184, 192 (2d Cir. 1986).

[4] Appellants also alleged in their complaint pendent state law claims which were dismissed by the district court when the basis for pendent jurisdiction (the RICO claim) was dismissed. At oral argument the court was advised that state court proceedings had been or were to be initiated. We, of course, do not reach any such claims in this opinion.

McMILLIAN, Circuit Judge, concurring.

I fully concur in the decision to affirm the district court's dismissal of the complaint for failure to satisfy the continuity prong of the pattern of racketeering activity test adopted by this circuit. I write separately only to state that I agree with Judge John R. Gibson that we should reconsider our pattern of racketeering activity test, in light of the contrary positions recently taken by several other circuits.

JOHN R. GIBSON, Circuit Judge, concurring.

I concur in the court's opinion because I am satisfied that this result is compelled by our earlier cases commencing with *Superior Oil Co. v. Fulmer*, 785 F.2d 252 (8th Cir. 1986). In *Henning v. First Bank of Worthington*, No. 86-5320 (8th Cir. July 7, 1987), I concurred separately and expressed my view that the multiple scheme requirement that we have grafted onto the pattern element strays from the statutory language of RICO. The Second and Seventh Circuits, and now the Ninth Circuit, as well as numerous district courts and a respected scholar in this field, have criticized our position.[1]

I believe, as stated in my separate concurrence in *Henning*, that when a proper case arises the multiple scheme requirement should be examined by the court en banc.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

---

[1] *See Henning, supra*, footnote 5, and *Sun Savings & Loan Assn. v. Dierdorff*, No. 86-5811, 56 U.S.L.W. 2110 (9th Cir. Aug. 7, 1987).

APPENDIX D

UNITED STATES DISTRICT COURT
District of Minnesota
Fourth Division

Civil 4-86-546

H.J. INC., a Minnesota corporation, KIRK DAHL, LARRY KRUGEN and MARY KRUGEN, individually and d/b/a PHOTO IMAGES, SUSAN DAVIS, ROBERT NEAL, ISAAC H. WARD, RICHARD L. ANDERSON, THOMAS J. MOTT, and all others similarly situated,

Plaintiffs,

v.

NORTHWESTERN BELL TELEPHONE COMPANY, a subsidiary of U.S. WEST, A.B.C. individually and D.E.F. as corporations, and other unnamed Co-conspirators,

Defendants.

MEMORANDUM AND ORDER

Mark Reinhardt, Susan Bedor, Reinhardt & Anderson, 1014 Conwed Tower, 444 Cedar Street, St. Paul, MN 55101, and John Cochrane, Cochrane & Bresnahan, 24 East Fourth Street, St. Paul, MN 55101, for plaintiffs.

John D. French, John F. Beukema, James L. Volling, Joseph H. Otterstetter, Faegre & Benson, 2300 Multifoods Tower, 33 South Sixth Street, Minneapolis, MN 55402, and Stephen T. Refsell, General Attorney, Northwestern Bell Telephone Company, Room 1800, 200 South Fifth Street, Minneapolis, MN 55402, for defendants.

This matter is before the Court on plaintiffs' motion to reconsider. Plaintiffs' motion will be denied.

FACTS

This is a class action arising under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-1968. Plaintiffs also bring a state law claim pursuant to the Court's pendent jurisdiction, alleging acts of bribery in contravention of Minn. Stat. § 609.42, subd. 1(1) and (2) and the common law of bribery. By order dated November 21, 1986, the Court granted defendant Northwestern Bell Telephone Co.'s (Northwestern Bell) motion to dismiss the complaint in its entirety. The facts of the case are set forth in the Court's prior order and will not be extensively reprised here. In brief, plaintiffs allege that Northwestern Bell, by and through its corporate agents, initiated a scheme designed to illegally influence various members of the Minnesota Public Utilities Commission (MPUC), the regulatory body which sets rates which Northwestern Bell may charge for the goods and services it provides. Plaintiffs allege that from early 1980 and through the present Northwestern Bell has offered benefits, rewards and consideration to certain MPUC commissioners, including bribes, offers of employment and various gifts, free meals, and emoluments, with intent to influence these commissioners in the performance of their duties. In its November 21 memorandum and order, the Court found that plaintiffs had failed to allege a "pattern" of racketeering within the meaning of the RICO statute, and accordingly granted defendant's motion to dismiss the RICO counts of plaintiffs' amended complaint. The Court dismissed plaintiffs' pendent state law claim without prejudice. Plaintiffs now bring this motion for reconsideration.

DISCUSSION

A. Pattern of Racketeering

It is by now well established that in order to establish a civil RICO cause of action plaintiffs must prove the existence of

four elements: (1) conduct, (2) of an enterprise, (3) through a pattern, (4) of racketeering activity. *See Sedima, S.P.R.L. v. Imrex Co.*, 105 S.Ct. 3275, 3285 (1985) (footnote omitted); *Simon v. Fribourg*, CIVIL 4-86-259, slip op. at 9 (D.Minn. Aug. 20, 1986). The RICO act defines "pattern of racketeering injury" in the following terms:

> "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity.

18 U.S.C. § 1961(5). In *Sedima* the Supreme Court pointed out that while at least two acts of racketeering are necessary to form a pattern, two acts may not be sufficient. *Sedima*, 105 S.Ct. at 3285 n.14. Rather, it is the factor of continuity plus relationship which combines to produce a pattern. *Sedima*, 105 S.Ct. at 3285 n.14, *citing* S.Rep.No. 91-617, p. 158 (1969). In passing, the *Sedima* majority noted that the failure of Congress or the courts to develop a meaningful concept of "pattern" has contributed to the expansive potential of RICO's application, and suggested that a stricter interpretation of the pattern requirement might be the key to arresting civil RICO's explosive growth. *Sedima*, 105 S.Ct. at 3287. Subsequently, the lower courts have accepted the Supreme Court's invitation to flesh out the pattern element, albeit with varying results. *See, e.g., Frankart Distributors, Inc. v. RMR Advertising, Inc.*, 632 F.Supp. 1198, 1200 (D.S.N.Y. 1986) (numerous courts have struggled with establishing a definition of pattern of racketeering activity in light of the *Sedima* Court's reasoning and the clear objectives of the RICO statute); *Smoky Greenhaw Cotton Co. v. Merrill Lynch, Pierce, Fenner and Smith, Inc.*, 785 F.2d 1274, 1280 n.7 (5th Cir. 1986) (Fifth Circuit directed its lower courts to consider more rigorous interpretation of the pattern requirement).

In the language of one of the more trusted sources for the definition of English words, a "pattern" is defined as: "an arrangement or composition that suggests or reveals a design; a configuration. . . ." WEBSTER'S NEW COLLEGIATE DICTIONARY (C & G Merriam Co. 1961), *cited in United States v. Freshie Co.*, 639 F.Supp. 442, 444 (E.D.Pa. 1986). The Omnibus Crime Control Act of 1970 provides that "criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." 18 U.S.C. § 3575(e), *cited in Sedima*, 105 S.Ct. at 3285 n.14. The courts have suggested that to compose a pattern "the acts complained of must be related to and similar in purpose, and must be part of an ongoing series of acts, rather than separate incidents in a series of sporadic activities." *Louisiana Power and Light Co. v. United Gas Pipe Line Co.*, 642 F.Supp. 781, 808 (E.D.La. 1986), *citing Superior Oil Co. v. Fulmer*, 785 F.2d 252, 257 (8th Cir. 1986). In their search for a meaningful interpretation of "pattern" the courts have focused on the dual requirements of "relationship" and "continuity" highlighted by the *Sedima* majority.

1. *Relationship*

Relationship generally has proved the less problematic of the prongs enunciated by *Sedima*. It has been stated that to be related, the predicate acts of a RICO claim must involve common perpetrators, common methods of commission, common victims, and a common motive or purpose. *Medallion TV Enterprises, Inc. v. SelecTV of California, Inc.*, 627 F.Supp. 1290, 1296 (C.D.Cal. 1986); *Graham v. Slaughter*, 624 F.Supp. 222, 225 (N.D.Ill. 1985); *Allington v. Carpenter*, 619 F.Supp. 474,

478 (C.D.Cal. 1985). Relationship requires that the acts of racketeering be related to the operation of the enterprise, that is, sufficiently related to the statutorily proscribed conduct. *Papai v. Cremosnik*, 635 F.Supp. 1402, 1407-08 (N.D.Ill. 1986); *Technology Exchange Corp. of America, Inc. v. Grant County State Bank*, 646 F.Supp. 179, 183 (D.Colo. 1986). As stated by the United States Court of Appeals for the Seventh Circuit in *Morgan v. Bank of Waukegan*, 804 F.2d 970, 975 (7th Cir. 1986), "[r]elationship implies that the predicate acts were committed somewhat closely in time to one another, involve the same victim, or involve the same type of misconduct." *Morgan*, 804 F.2d at 975.

In this case, it is clear that plaintiffs have alleged a "relationship" among and between the predicate acts of racketeering enumerated in their amended complaint. Plaintiffs have identified common prepetrators, Northwestern Bell and certain of its officers and agents; common victims, Northwestern Bell's ratepayers; and a common motive or purpose, improper influence of MPUC commissioners through bribes, gifts and assorted emoluments. Plaintiffs have alleged that the acts of racketeering are related to the operation of the enterprise, and that each of these acts was directed toward a similar end. In this case, as in most reported RICO decisions, plaintiffs have little difficulty surmounting the "relationship" barrier.

2. *Continuity*

As the Court noted in its November 21 order, continuity presents a more problematic analysis, both on the facts of this case and in general. At a minimum, continuity means that plaintiffs must allege "more than sporadic or isolated activity." *Graham*, 624 F.Supp. at 225. The term pattern "connotes a multiplicity of events: . . . The continuity inherent in the term presumes repeated criminal activity, not merely repeated acts to carry out the same criminal activity." *Northern Trust*

Bank/O'Hara, N.A. v. Inryco, Inc., 615 F.Supp. 828, 831 (N.D. Ill. 1985). In this respect, ongoing criminal activity or at least a threat of ongoing criminal activity is a key indicium of continuity. *Ghouth v. Conticommodity Services, Inc.*, 642 F.Supp. 1325, 1337 (N.D.Ill. 1986). One court has stated that in determining whether continuity exists, courts should look to "the purposes, results, participants, victims and methods of commission." *Technology Exchange*, 646 F.Supp. at 183-84. Quite obviously, these are identical to the factors to be assessed in gauging "relatedness." The "inherent contradiction" which exists between the dual requirements of relatedness and continuity is perhaps resolved by recognizing that relatedness requires proof that the predicate acts are "sufficiently connected," while, in contrast, continuity requires proof that the predicate acts are "sufficiently differentiated." *Freshie*, 639 F.Supp. at 445; *Allington*, 619 F.Supp. at 478. To prove relatedness, plaintiffs must demonstrate that the predicate acts evince common perpetrators, victims, methods, motive or purpose. To prove continuity, plaintiffs must demonstrate that the racketeering acts are "sufficiently unconnected in time or substance to warrant consideration as separate criminal episodes." *Allington*, 619 F.Supp. at 478. As stated in *Freshie*:

> [A]n inherent tension exists between the dual requirements of relatedness and continuity. Viewed on a continuum, these two requirements must reach some equitable balance to form a "pattern." . . . [T]he acts must be "sufficiently connected, but also sufficiently differentiated." . . . [A]s the acts become more related, the same transactions lose some of their separateness. On the other hand, if a series of predicate acts satisfied the requirement of "separate criminal episodes," then those acts

might well not meet the relatedness requirement, being too disjointed (different subject matter) and too remote (in time).

Freshie, 639 F.Supp. at 445 (citations omitted).

The United States Court of Appeals for the Eighth Circuit has had an opportunity to address the continuity requirement in four post-*Sedima* decisions. In *Alexander Grant and Co. v. Tiffany Industries, Inc.*, 770 F.2d 717 (8th Cir. 1985), *cert. denied*, 106 S.Ct. 799 (1986), the Court stated in dictum that plaintiff's allegations of twenty-six acts of mail fraud and four acts of wire fraud were sufficient to demonstrate a pattern of racketeering activity. The Court declared:

> The number and nature of acts, together with allegations demonstrating their similar purposes, results, participants, victims, and methods of commission, bespeak a sufficient "continuity plus relationship" to satisfy the Supreme Court's concerns in *Sedima* that RICO not be extended to reach sporadic activity.

Alexander Grant, 770 F.2d at 718 n.1.

In *Superior Oil Co. v. Fulmer*, 785 F.2d 252 (8th Cir. 1986) the court found that plaintiff's allegations of several related acts of mail and wire fraud in furtherance of a scheme to convert gas from plaintiff's pipeline did not rise to the level of a "pattern" of racketeering activity. The Court declared that proof of a single fraudulent scheme, implemented by several fraudulent acts, does not bespeak "continuity" in the absence of proof that the defendants "had ever done these activities in the past . . . [or] that they were engaged in other criminal activities elsewhere," *Superior Oil*, 785 F.2d at 257. The court concluded:

> The actions of [defendants] comprised one continuing scheme to convert gas from [plaintiff's] pipeline. . . . On

> the facts of this case, we agree with the court's conclusion in *Northern Trust Bank/O'Hara, N.A. v. Inryco, Inc.*, 615 F.Supp. 828, 832 (D.C.Ill. 1985), that "[i]t is difficult to see how the threat of continuing activity stressed in the Senate Report could be established by a single criminal episode. * * * It places a real strain on the language to speak of a single fraudulent effort, implemented by several fraudulent acts, as a "pattern of racketeering activity."

Superior Oil, 785 F.2d at 257 (footnote omitted).

In *Holmberg v. Morrisette*, 800 F.2d 205 (8th Cir. 1986), plaintiff offered proof of several acts of wire or mail fraud related to a single scheme to draw letters of credit. The Eighth Circuit found that, because defendants' fraudulent acts were undertaken as part of a "common purpose of scheme," there was no showing of continuity, absent proof that the defendants "had engaged in like activities in the past or that they were engaged in other criminal activities." *Holmberg*, 800 F.2d at 210. In the absence of allegations of like wrongful activity in the past or other wrongful activity elsewhere, plaintiff's RICO claim was found to be fatally defective.

The most recent Eighth Circuit teaching on the subject is *Deviries v. Prudential-Bache Securities, Inc.*, 805 F.2d 326 (8th Cir. 1986). In *Deviries* plaintiff alleged that the defendant had made misrepresentations to secure his securities brokerage account and then "churned" the account over a six-year period. The Eighth Circuit found that each of the predicate acts alleged were committed in furtherance of a single "scheme," and that accordingly, plaintiff had "failed to allege the continuity necessary to establish a 'pattern' of racketeering activity." *Deviries*, 805 F.2d at 329. Following *Superior Oil* and *Holmberg*, the *Deviries* court found plaintiff's allega-

tions of a "pattern" insufficient absent an "allegation that [defendants] had engaged in similar endeavors in the past or that they were engaged in other criminal activities." *Deviries*, 805 F.2d at 329.

As a number of courts and commentators have noted, the Eighth Circuit's approach to the pattern requirement lies at one end of the spectrum of post-*Sedima* RICO "pattern" jurisprudence. What is required to allege a pattern of racketeering activity in the Eighth Circuit is proof of multiple criminal schemes or episodes, that is, that defendants have engaged in similar criminal activities in the past or are engaged in other criminal activities elsewhere. Critics of this approach point out that it appears to run contrary to the *Sedima* court's directive that "RICO is to 'be liberally construed to effectuate its remedial purposes,'" *Sedima*, 105 S.Ct. at 3286, *quoting* Pub.L. 91-452, § 904(a), 84 Stat. 947, and that "the imposition of a 'multi-scheme' requirement . . . could arbitrarily exclude large-scale frauds from [RICO's] scope simply because the actors' overall goal—while perhaps no less ambitious or ultimately harmful than a series of short-range illegal plots—happens to be a monolithic one." *McLendon v. the Continental Group, Inc.*, No. 83-1340, slip op. at 8 (D.N.J. July 31, 1986); *Morgan*, 804 F.2d at 975. Advocates of the Eighth Circuit's restrictive approach contend that "[t]his construction of the pattern requirement is the only construction that effectuates Congress' intent to avoid imposition of RICO liability where there have been only isolated or sporadic criminal acts." *Frankart*, 632 F.Supp. at 1201. *See, e.g., Simon*, slip op. at 9 (no pattern where plaintiff does not allege that defendants concocted a similar scheme in any other year or that they were otherwise involved in any criminal activity); *Kredietbank, N.V. v. Joyce Morris, Inc.*, CIVIL No. 84-1903 slip op. (D.N.J. Oct. 11, 1985) (a series of fraudulent mailings did not

constitute a pattern of racketeering activity where mailings were all aimed at implementing a single fraudulent scheme); *Medical Emergency Service Association S.C. v. Foulke*, CIVIL 85-4064, slip op. (N.D.Ill. Jan. 7, 1986) (multiple mailings in furtherance of a single criminal episode are insufficient to establish a pattern of racketeering activity); *Dunham v. Independence Bank of Chicago*, 629 F.Supp. 983 (N.D.Ill. 1986) (no pattern where each of the predicate acts occurred in the execution of a single, though repeated, substantive misrepresentation); *Professional Assets Management, Inc. v. Penn Square Bank, N.A.*, 616 F.Supp. 1418 (W.D.Okla. 1985) (no pattern where claim arises from one engagement to perform one bank audit); *Teleprompter of Erie, Inc. v. City of Erie*, 537 F.Supp. 6 (W.D.Pa. 1981) (multiple bribes received by councilman at a political fundraiser did not constitute a pattern); *Rich Mail Kitchens, Inc. v. Pennsylvania Lumbermens Mutual Insurance Co.*, 641 F.Supp. 297 (E.D.Pa. 1986) (one isolated fraudulent scheme, even if containing more than one fraudulent act, is not enough to constitute a pattern); *Richardson Greenshields of Canada Ltd. v. Patel*, 643 F.Supp. 672 (S.D.N.Y. 1986) (no pattern where predicate acts were part of a single, unified activity); *Exeter Towers Associates v. Bowditch*, 604 F.Supp. 1547 (D.Mass. 1985) (two acts of mail fraud in connection with the purchase of a single mortgage does not constitute a pattern).

At the other extreme are those cases, most notably the decision of the United States Court of Appeals for the Fifth Circuit in *R.A.G.S. Couture, Inc. v. Hyatt*, 774 F.2d 1350 (5th Cir. 1985), holding that a showing of two related predicate acts is sufficient. *See also Trak Microcomputer Corp. v. Wearne Bros.*, 628 F.Supp. 1089 (N.D.Ill. 1985); *Conan Properties, Inc. v. Mattel, Inc.*, 619 F.Supp. 1167 (S.D.N.Y. 1985); *Systems Research, Inc. v. Random, Inc.*, 614 F.Supp. 494

(N.D.Ill. 1985). Critics of this approach point out that it will invariably "sweep into federal courts, under RICO, the great majority of actions for fraud in commercial transactions." *Exeter*, 604 F.Supp. at 1554.[1]

A number of courts, most notably the United States Court of Appeals for the Eleventh Circuit in *Bank of America National Trust & Savings Association v. Touche Ross & Co.*, 782 F.2d 966 (11th Cir. 1986), have attempted to steer a middle ground, holding that a single fraudulent scheme which encompasses various predicate acts over a significant period of time satisfies the pattern requirement. *See Freshie*, 639 F.Supp. at 444. Under this approach, it is not necessary to allege multiple criminal schemes, provided that plaintiff alleges an "open-ended scheme" over an extended period of time evincing criminal activity which is continuous in nature rather than isolated. *B.J. Skin & Nail Care, Inc. v. International Cosmetic Exchange, Inc.*, 641 F.Supp. 563, 566 (D.Conn. 1986). In *Morgan v. Bank of Waukegan*, 804 F.2d 970 (7th Cir. 1986), the Seventh Circuit appeared to adopt this intermediate approach, holding that "[i]n order to be sufficiently continuous to constitute a pattern of racketeering activity, the predicate acts must be ongoing over an identified period of time so that they can fairly be viewed as constituting separate transactions, *i.e.*, 'transactions 'somewhat separated in time and place.' ' . . . ." *Morgan*, 804 F.2d at 975. Advocates of the intermediate approach, dubbed the "multiple episodes plus ongoing course of conduct" standard, *Gidwitz v. Stirco, Inc.*, 646 F.Supp. 825, 829 (N.D.Ill. 1986), contend that it deflects

[1] The *R.A.G.S.* opinion is unpersuasive for another reason. In the subsequently decided *Smoky Greenhaw* opinion the Fifth Circuit seemed to suggest that the nature of the pattern requirement remained an open question, without reference to *R.A.G.S. See Smoky Greenhaw*, 785 F.2d at 1280 n.7.

"garden variety" commercial fraud cases while sweeping into the RICO net those cases which are large in scale albeit monolithic. *See, e.g., Temporaries, Inc. v. Maryland National Bank*, 638 F.Supp. 118 (D.Md. 1986); *Louisiana Power*, 642 F.Supp. at 808; *Freshie*, 639 F.Supp. at 445.

Plaintiffs urge the Court to adopt the intermediate approach above-referenced and to find that because the amended complaint includes allegations of various predicate acts committed over an extended, identifiable period of time, the continuity aspect of the pattern requirement is met, notwithstanding that these predicate acts transpired in connection with a single "scheme." As stated by the Court in its prior order, were the Court writing on a clean slate these arguments might well be persuasive. The Eighth Circuit has thrice held, however, that continuity requires proof of multiple criminal episodes. *Superior Oil*, 785 F.2d at 257; *Holmberg*, 800 F.2d at 210; *Deviries*, 805 F.2d at 329. This unbroken line of authority the Court is not free to disregard. Here, plaintiffs' amended complaint includes no allegations of separate transactions—merely separate predicate acts—and no allegations that these predicate acts have independent harmful significance. Each of the predicate acts alleged by plaintiffs was committed in furtherance of a single scheme to influence MPUC commissioners to the detriment of Northwestern Bell's ratepayers. The Court is obliged to turn to the language of *Superior Oil, Holmberg*, and *Deviries*: plaintiffs simply have not alleged that defendants have engaged in like activities in the past or that they are engaged in other criminal activities elsewhere.

The approach adopted by the Eighth Circuit is designed to give meaning to Congress' intended rejection of RICO liability predicated upon isolated or sporadic criminal acts. *Allington*, 619 F.Supp. at 478, *citing* 116 Cong.Rec. 35193 (statement of Rep. Poff) (RICO not aimed at the isolated offender). More-

over, the requirement that plaintiffs in a civil RICO action demonstrate that the predicate acts occurred in different criminal episodes is consistent with the connotation of multiple events implicit in the term pattern. *Medallion TV*, 627 F.Supp. at 1296. A "pattern" requires more than one single criminal episode carved into distinct predicate acts. *Commercial Agropequaria Menichetti Fuente S.A.C.I. v. Heather Trading Corp.*, 85 CIVIL 3240, slip op. at 8 (S.D.N.Y. Mar. 27, 1986), *cited at Richardson*, 643 F.Supp. at 674.[2] Although plaintiffs have alleged numerous predicate acts over an extended period of time, it is clear that these acts were part and parcel of a unified, monolithic criminal scheme. The predicate acts alleged by plaintiffs are not "sufficiently unconnected in time and substance to warrant consideration as separate criminal episodes." *Medallion TV*, 627 F.Supp. at 1297.

Plaintiffs urge the Court to depart from the multiple criminal schemes test adopted by the Eighth Circuit and to focus instead on factors such as the duration of the alleged racketeering activity and the number of victims. A number of courts and commentators have noted that an interpretation of "pattern" which turns on fine distinctions between single or multiple "episodes" or "schemes" is ill-suited to accomplishment of RICO's central purpose, the eradication of "traditional mobster and racketeer activity and comparable ongoing structured criminal enterprises." ABA Ad Hoc Civil Task Force 71, *quoted in Sedima*, 105 S.Ct. at 3289 (Powell, J., dissenting). These courts have focused analysis on several relevant factors, including:

[2] As stated by Justice Powell in his *Sedima* dissent, "[t]he definition of pattern may . . . logically be interpreted as meaning that the presence of the predicate acts is only the beginning: something more is required for a 'pattern' to be proved." *Sedima*, 105 S.Ct. at 3289 (Powell, J. dissenting).

(1) *Duration*—One indicium of "continuity" is the duration of the alleged criminal activity. To the extent plaintiff alleges criminal activity which is ongoing over an identified period of time, the possibilities are enhanced that defendants are indeed engaged in traditional mobster activity or comparable ongoing structured criminal enterprises. Conversely, where the predicate acts are of a finite and limited duration, directed at a specific goal, the likelihood increases that ordinary commercial fraud is involved.

(2) *Threat of Ongoing Criminal Activity*—Hand-in-hand with duration, which focuses on past events, is the threat of ongoing criminal activity, which focuses on the likelihood that defendant's criminal activities will continue into the future. Absent allegations that defendants' scheme has the potential to continue indefinitely a strong likelihood exists that the wrongs alleged are isolated, not systematic.

(3) *Multiple Victims*—One characteristic of traditional mobster activity or comparable ongoing structured criminal enterprises is the presence of many victims. "The repetition of an act taken against a single victim . . . suggests no expansion, no ongoing design, no continuity, such as was the target of Congress" in enacting RICO. *Satellite Financial Planning Corp. v. First National Bank of Wilmington*, 646 F.Supp. 118, 120 (D.Del. 1986); *Kriedtbank*, slip op. at 9.

(4) *Independent Harmful Significance*—Some courts have looked to the independent harmful significance of the predicate acts alleged by plaintiffs as an indicium of continuity. A predicate act has independent harmful significance if, standing alone, it brings above the injury complained of. A predicate act lacks independent harmful significance if it brings about injury only in conjunction with other predicate acts.

(5) *Methods of Commission*—One factor frequently cited by the courts is the method of commission employed by the de-

fendants. This factor is perhaps less useful than the others, in that it is well-accepted that the mere fact that defendants have employed more than one fraudulent method does not establish a pattern.

(6) *Regular Part of Defendants' Business*—One court has suggested that "RICO's purposes are best served by also requiring that . . . a reasonable inference can be made that these episodes were not an aberration in the way a defendant conducted his business. Rather, the pattern made up of multiple episodes must be a regular part of the way a defendant does business and in that sense, ongoing." *Papai*, 635 F.Supp. at 1412.

The above-referenced factors have been highlighted by some courts as having relevance to the pattern inquiry. The courts have noted that these factors are not exhaustive and that all factors need not be proven in each case. The pattern question must inevitably be decided on a case-by-case basis. *Ghouth*, 642 F.Supp. at 1337. The intent of this analysis is to "flesh out the identifying characteristics of the [term] 'episode,' using the concept of 'continuity' as a guidepost." *Ghouth*, 642 F.Supp. at 1339.

Even assuming that these factors have relevance, the Court would still be constrained to find that plaintiffs have not alleged a pattern of racketeering activity. Plaintiffs have alleged criminal activity of long duration. Whether plaintiffs have alleged the threat of continuing criminal activity is a closer question, particularly in view of the review by the MPUC of its past actions. Plaintiffs have alleged the presence of multiple victims, assuming that the body of Northwestern Bell ratepayers is not one corporate victim, but has not shown independent harmful significance, since it is the aggregate of predicate acts which produced their injuries. Plaintiffs have alleged various methods of commission. It cannot be said, however, that the alleged "pattern" of predicate acts is a "regular part of the way" defendants conduct their business. On balance, the Court finds that, applying the enumerated factors, plaintiffs' allegations do not fit the RICO paradigm. Of course, in the Eighth Circuit the governing standard is the multiple criminal episodes test of *Superior Oil*, *Holmberg*, and *Deviries*. Applying this test, the Court finds that plaintiffs have not alleged a pattern of racketeering activity. Accordingly, plaintiffs' motion for reconsideration of the Court's RICO ruling is denied.

3. *Enterprise—Person*

Plaintiffs' Count II arises under RICO, 18 U.S.C. § 1962(a). For purposes of their section 1962(a) claim, plaintiffs allege that Northwestern Bell is both a "person" within the meaning of 18 U.S.C. § 1961(3) and an "enterprise" within the meaning of 18 U.S.C. § 1961(4). In its November 21 order the Court noted that the Eighth Circuit has ruled that for purposes of a claim arising under section 1962(c) the RICO enterprise must be distinct from the RICO person. *See Bennett v. Berg*, 685 F.2d 1053 (8th Cir. 1982), *on rehearing*, 710 F.2d 1361 (8th Cir.), *cert. denied*, 104 S.Ct. 527 (1983). With this in view, the Court stated that in a section 1962(a) action as in a section 1962(c) action plaintiffs must allege and prove a RICO "enterprise" separate and distinct from the RICO "person."

A number of courts have found that the person and enterprise need not be distinct in a section 1962(a) action. *See, e.g., B.F. Hirsch, Inc. v. Enright Refining Co.*, 751 F.2d 628 (3d Cir. 1984); *Haroco, Inc. v. American National Bank and Trust Co. of Chicago*, 747 F.2d 384 (7th Cir. 1984); *Schreiber Distributing Co. v. Serv-Well Furniture Co.*, 55 U.S.L.W. 2364-65 (9th Cir. Dec. 24, 1986). Other courts have ruled that the distinction pertains in a section 1962(a) action. *United States*

v. Computer Sciences Corp., 689 F.2d 1181 (4th Cir. 1982); *Rush v. Oppenheimer & Co.*, 628 F.Supp. 1188, 1197 (S.D.N.Y. 1985). The Court continues be of the view that the RICO person and enterprise must be distinct for purposes of a section 1962(a) claim. In addition to the reasons cited in the Court's November 21 order, the Court notes the following:

(1) In the absence of "very explicit statutory language," the courts are not inclined to accept the proposition that a civil RICO defendant could participate with itself in the illicit use or investment of income derived from a pattern of racketeering activity. *Computer Sciences Corp.*, 689 F.2d at 1183.

(2) Because civil RICO was intended to provide a remedy against the infiltrator of legitimate business, and not against the infiltrated enterprise, a separate enterprise-person requirement is appropriate in a 1962(a) action as in a 1962(c) action. *Rush*, 628 F.Supp. at 1197.

(3) Perhaps most significantly, the construction of section 1962(a) urged by plaintiffs would fly in the face of ongoing efforts by Congress and the courts to curtail the expansive reach of civil RICO.

For these reasons, plaintiffs' motion for reconsideration of the Court's 1962(a) statements is denied.

4. *Filed Rate Doctrine*

In its November 21 order the Court found that the federal "filed rate" doctrine precludes plaintiffs' cause of action. Plaintiffs urge the Court to reconsider its position. Plaintiffs have not, however, cited any new authority or arguments in support of its motion for reconsideration. Accordingly, plaintiffs' motion will be denied.

Based on the foregoing, and upon review of all files, records and proceedings herein,

IT IS ORDERED that plaintiffs' motion for reconsideration is in all respects denied.

HARRY H. MacLAUGHLIN
Judge
United States District Court

DATED: February 18, 1987.

APPENDIX E

UNITED STATES DISTRICT COURT
District of Minnesota
Fourth Division

CIVIL 4-86-546

H.J. INC., a Minnesota corporation, KIRK DAHL, LARRY KRUGEN and MARY KRUGEN, individually and d/b/a PHOTO IMAGES, SUSAN DAVIS, ROBERT NEAL, ISAAC H. WARD, RICHARD L. ANDERSON, THOMAS J. MOTT, and all others similarly situated,

Plaintiffs,

v.

NORTHWESTERN BELL TELEPHONE COMPANY, a subsidiary of U.S. WEST, A.B.C. individually and D.E.F. as corporations, and other unnamed Co-conspirators,

Defendants.

Mark Reinhardt, Susan Bedor, Reinhardt & Anderson, 1014 Conwed Tower, 444 Cedar Street, St. Paul, MN 55101, and John Cochrane, Cochrane & Bresnahan, 24 East Fourth Street, St. Paul, MN 55101, for plaintiffs.

John D. French, John F. Beukema, James L. Volling, Joseph H. Otterstetter, Faegre & Benson, 2300 Multifoods Tower, 33 South Sixth Street, Minneapolis, MN 55402, and Stephen T. Refsell, General Attorney, Northwestern Bell Telephone Company, Room 1800, 200 South Fifth Street, Minneapolis, MN 55402 for defendants.

MEMORANDUM AND ORDER

This matter is before the Court on defendant Northwestern Bell Telephone Company's motion to dismiss and/or for summary judgment, and on plaintiffs' motion to strike defenses.

Plaintiffs' motion will be denied. Defendant's motion to dismiss will be granted.

FACTS

Plaintiff H.J., Inc. is a Minnesota corporation with its principal place of business in Burnsville, Minnesota. Plaintiffs Kirk Dahl, Mary Krugen, Larry Krugen, Susan Davis, Robert Neal, Isaac H. Ward, Richard L. Anderson, and Thomas J. Mott are each Minnesota residents. Each of the named plaintiffs has purchased telecommunications goods and services from Northwestern Bell. Defendant Northwestern Bell Telephone Co., a subsidiary of U.S. West, Inc., is a telecommunications concern supplying goods and services in interstate commerce. Defendants Harry Crump, Leo Adams, Barbara Beerhalter, Roger Hanson, and Juanita Satterlee are present or former members of the Minnesota Public Utilities Commission (MPUC). Defendant Robert Johnson is counsel for the Minnesota Telephone Association. Ray Larson, Roy Weir, Thomas Madison, and Gene Bier are officers and/or employees of Northwestern Bell.

This is a class action arising under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-1968. Plaintiffs allege that defendants committed acts in violation of 18 U.S.C. §§ 1962(a), (b), and (c) and further allege that defendants conspired to commit racketeering acts in violation of 18 U.S.C. § 1962(d). Plaintiffs also bring state law claims pursuant to the Court's pendent jurisdiction, alleging acts of bribery in contravention of Minn. Stat. § 609.42, subd. 1(1) and (2) and the common law of bribery.

The gist of plaintiffs' cause of action is an allegation that Northwestern Bell, by and through its corporate agents, initiated a scheme designed to illegally influence various members of the MPUC, the regulatory body which sets rates which Northwestern Bell may charge for the goods and services which it provides. Plaintiffs allege that from July, 1980 and through the present, Northwestern Bell has offered, promised, or given, directly or indirectly, certain benefits, rewards, and consideration to duly appointed MPUC commissioners, with the intent to influence said commissioners with respect to the performance of their duties as officers of the MPUC. Amended Complaint ¶ 30. Specifically, plaintiffs allege the following corrupting acts:

(1) MPUC commissioner Hanson negotiated with Northwestern Bell officials including Gene Bier, Northwestern Bell's chief executive officer, regarding an offer of employment made to Hanson by Northwestern Bell in November, 1984, at a time when Hanson was still an MPUC commissioner. Amended Complaint ¶ 37.

(2) MPUC commissioner Hanson received illicit payments from Northwestern Bell of $30,000 during 1985. The illicit payments were made to Robert Johnson, counsel for the Minnesota Telephone Association, and passed on to Hanson. Amended Complaint ¶ 38. These illicit payments continued after Hanson was reappointed MPUC commissioner on November 25, 1985. Amended Complaint ¶ 39.

(3) Northwestern Bell executives Thomas Madison and Roy Weir made an offer of employment to MPUC commissioner Juanita Satterlee while Satterlee was still a commission member. Amended Complaint ¶ 40.

(4) Northwestern Bell made illicit payments to Satterlee of $106,129 during the period 1983-1984, while Satterlee was an MPUC commissioner. Amended Complaint ¶ 41.

(5) Northwestern Bell officer Larson provided MPUC commissioner Crump with a free plane ride from Oklahoma to Minneapolis on June 26, 1985. Amended Complaint ¶ 31.

(6) MPUC commissioners Crump and Beerhalter were provided with an all-expenses-paid excursion to Canterbury Downs in September, 1985, courtesy of Northwestern Bell. Amended Complaint ¶¶ 32, 36.

(7) MPUC commissioner Crump was provided with tickets to various Broadway plays by Northwestern Bell officials between 1984 and the present. Amended Complaint ¶ 33.

(8) MPUC commissioners Crump and Adams were provided with free tickets to various sporting events by Northwestern Bell officials during the period 1981 to the present. Amended Complaint ¶¶ 34, 35.

(9) During the period July, 1980 to the present, Northwestern Bell has expended thousands of dollars for various gifts, emoluments, meals, and parties for MPUC commissioners. Amended Complaint ¶ 42.

Plaintiffs' complaint is in five counts. Count I is a state law claim alleging that the defendants bribed MPUC commissioners by offering to those commissioners benefits, rewards, and consideration to which they were not entitled. Plaintiffs seek civil recovery based on violation of the Minnesota criminal bribery statute, Minn. Stat. § 609.42, subd. 1(1) and (2), and for common law bribery. Count II is a RICO claim arising under section 1962(a). Count III arises under RICO section

1962(b), alleging that the defendants associated with the MPUC in unlawful racketeering activity. Count IV arises under RICO section 1962(c) and Count V is a conspiracy count arising under RICO section 1962(d). Each of the RICO counts involves an allegation that the defendants and the MPUC associated together for the purpose of unlawful racketeering activity.

Plaintiffs seek to recover compensatory damages, measured by the amount received by Northwestern Bell in excess of what would have been a fair and reasonable charge for telephone services. Plaintiffs also seek to recover punitive damages, treble damages pursuant to RICO, 18 U.S.C. § 1984(c), and an injunction prohibiting defendants from engaging in further unlawful activity.[1]

Defendant Northwestern Bell now brings this motion to dismiss and/or for summary judgment. Plaintiffs have filed a counter-motion to strike defenses.

DISCUSSION

A. *Timeliness*

As a threshhold matter, plaintiffs argue that defendant's Rule 12(b)(6) motion to dismiss is untimely. Defendant's motion was filed after defendant's answer to plaintiffs' amended complaint. Rule 12(b)(6) provides that a motion to dismiss for failure to state a claim upon which relief can be granted shall

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[1] The Court was pleased to note that on November 7, 1986 the MPUC voted to reconsider a $57.5 million rate increase granted to Northwestern Bell in 1984. As the Court noted at oral argument, the Commission appears to be an appropriate place to consider whether the alleged briberies and other improper contacts had any effect upon the rate increases granted to Northwestern Bell by the MPUC. The MPUC's decision to reopen the case means that the rate differentiations of which plaintiffs complain could be corrected by an MPUC decision to abrogate the 1984 rate increases. Minneapolis Star & Tribune, November 8, 1986, at 1, col. 4.

be made "*before* [responsive] pleading if a further pleading is permitted." Fed.R.Civ.P. 12(b)(6) (emphasis added). Rule 12 gives the defendant the option of raising a defense by motion or by the pleadings, however. Courts have discretion to allow 12(b)(6) motions if the defense has been previously included in the answer. 5 C.Wright, A.Miller & M.Kane, *Federal Practice and Procedure* § 1361 at 643 n.35. Here, defendant raised its defenses in its answer. In the exercise of the Court's discretion the defendant will be permitted to bring a Rule 12(b)(6) motion at this time.

B. *Motion to Strike Defenses*

Plaintiffs have brought a motion to strike defendants' third, fourth, fifth, sixth, seventh, ninth, tenth, eleventh, and twelfth defenses. Plaintiffs' motion is brought pursuant to Fed.R.Civ.P. 12(f) which provides:

> Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon him or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

Fed.R.Civ.P. 12(f). A Rule 12(f) motion to strike defenses is a drastic remedy which is disfavored by the courts and is infrequently granted. *Vernon J. Rockler & Co. v. Minneapolis Shareholders Co.*, 69 F.R.D. 1, 5 (D.Minn. 1975). A Rule 12(f) motion to strike will be granted only where the Court is convinced that there are no questions of fact, that any questions of law are clear and not in dispute, and that under no set of circumstances could the defenses succeed. *Carter-Wallace, Inc. v. Riverton Laboratories, Inc.*, 47 F.R.D. 366, 368 (S.D.N.Y. 1969).

Plaintiffs have failed to show that the "drastic remedy" of striking defendants' defenses is appropriate in the case at bar. Each of the challenged defenses is facially valid. Accordingly, plaintiffs' Rule 12(f) motion to strike defenses will be denied.

C. *RICO*

In order to establish a RICO cause of action plaintiffs must prove the existence of four elements:

(1) conduct
(2) of an enterprise
(3) through a pattern
(4) of racketeering activity.

See Sedima, S.P.R.L. v. Imrex Co., 105 S.Ct. 3275, 3285 (1985) (footnote omitted); *Simon v. Fribourg*, CIVIL 4-86-259, slip op. at 9 (D.Minn. Aug. 20, 1986). Defendant moves to dismiss plaintiffs' RICO claim on the ground that plaintiffs have failed to allege a "pattern" of racketeering activity.

1. *"Pattern" of Racketeering Activity*

An essential element of the RICO civil cause of action is proof that defendants have engaged in a "pattern" of racketeering activity. The "pattern" requirement was subjected to a searching analysis in the Supreme Court's *Sedima* decision. The *Sedima* Court enunciated the following guiding principles:

> (1) two isolated acts of racketeering activity do not constitute a pattern;
>
> (2) it is the factors of *continuity plus relationship* which combine to produce a pattern;
>
> (3) the "pattern" element of the statute was designed to limit RICO's application to planned, ongoing, continuing crime as opposed to sporadic, unrelated, isolated criminal episodes.

See Sedima, 105 S.Ct. at 3285 n.14.[2]

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[2] The *Sedima* Court made the following observations:

> As many commentators have pointed out, the definition of a "pattern of racketeering activity" differs from the other pro-

The United States Court of Appeals for the Eighth Circuit has explored the meaning of "pattern" in a civil RICO context in two recent cases, *Superior Oil Co. v. Fulmer*, 785 F.2d 252 (8th Cir. 1986) and *Holmberg v. Morrissette*, CIVIL Nos. 85-5138 and 85-5221 slip op. (8th Cir. Sept. 3, 1986). In *Superior Oil*, the plaintiff proved several related acts of mail and wire fraud in furtherance of a single crime—the conversion or theft of gas from plaintiff's pipeline. The Eighth Circuit found that plaintiff had satisfied the "relationship" prong of the *Sedima* test, but not the "continuity" prong. The Eighth

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visions in § 1961 in that it states that a pattern "*requires* at least two acts of racketeering activity," § 1961(5) (emphasis added), not that it "means" two such acts. The implication is that while two acts are necessary, they may not be sufficient. Indeed, in common parlance two of anything do not generally form a "pattern." The legislative history supports the view that two isolated acts of racketeering activity do not constitute a pattern. As the Senate Report explained: "The target of [RICO] is thus not sporadic activity. The infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective. It is this factor of *continuity plus relationship* which combines to produce a pattern." S.Rep. No. 91-617, p 158 (1969) (emphasis added). Similarly, the sponsor of the Senate bill, after quoting this portion of the Report, pointed out to his colleagues that "[t]he term 'pattern' itself requires the showing of a relationship. . . . So, therefore, proof of two acts of racketeering activity, without more, does not establish a pattern. . . ." 116 Cong.Rec. 18940 (1970) (statement of Sen. McClellan). *See also id.*, at 35193 (statement of Rep. Poff) (RICO "not aimed at the isolated offender"); House Hearings, at 665. Significantly, in defining "pattern" in a later provision of the same bill, Congress was more enlightening: "criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." 18 U.S.C. § 3575(e) 18 USCS § 3575(e). This language may be useful in interpreting other sections of the Act.

Sedima, 105 S.Ct. at 3285 n.14.

Circuit explained that proof of a "pattern" of racketeering activity requires more than proof of one racketeering activity and the threat of continuing activity. It is the factor of "continuity plus relationship" which combines to produce a pattern. The court found that proof of a single fraudulent scheme, implemented by several fraudulent acts, does not constitute a "pattern" of racketeering activity for RICO purposes. While the "relationship" prong of the pattern test is met by proof of several related acts of mail and wire fraud, in the absence of proof that the defendants "had ever done these activities in the past . . . [or] that they were engaged in other criminal activities elsewhere," *Superior Oil*, 785 F.2d at 257, it could not be said that plaintiffs had proved "continuity" sufficient to establish their RICO claims. The court concluded:

> [Plaintiff] has, however, failed to prove the "continuity" sufficient to form a "pattern of racketeering activity." The actions of [defendants] comprised one continuing scheme to convert gas from [plaintiff's] pipeline. . . . On the facts of this case, we agree with the court's conclusion in *Northern Trust Bank /O'Hare, N.A. v. Inryco, Inc.*, 615 F.Supp. 828, 832 (D.C.Ill. 1985), that "[i]t is difficult to see how the threat of continuing activity stressed in the Senate Report could be established by a single criminal episode. * * * It places a real strain on the language to speak of a single fraudulent effort, implemented by several fraudulent acts, as a "pattern of racketeering activity."

Superior Oil, 785 F.2d at 257 (footnote omitted).

In *Holmberg*[3] plaintiff offered proof of several acts of wire

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[3] In *Holmberg* the Eighth Circuit cited definitions of "pattern" drawn from the Omnibus Crime Control Act of 1970, 18 U.S.C. § 3575(e), wherein Congress provided that "criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of

or mail fraud related to a common purpose or scheme. The Eighth Circuit found that plaintiff had satisfied the "relationship" prong of *Sedima*. As in *Superior Oil*, however, the Court found that plaintiff had not satisfied the "continuity" prong. Because defendants' acts of wire and mail fraud were undertaken as part of a common purpose or scheme, there was no showing of continuity, notwithstanding that the single fraudulent effort was implemented by several acts of wire or mail fraud. The court stated: "[t]here was no evidence that [the defendants] had engaged in like activities in the past or that they were engaged in other criminal activities." *Holmberg*, slip op. at 9. In the absence of proof of like past or other present fraudulent activity, plaintiffs' civil RICO cause of action was dismissed.

Distilled to their essence, *Sedima*, *Superior Oil*, and *Holmberg* give rise to the following governing principles. In order to establish a "pattern" of racketeering activity plaintiffs must allege and prove (1) relationship, and (2) continuity. The relationship prong is satisfied by proof of several related acts in furtherance of a single criminal scheme. *Superior Oil*, 785 F.2d at 257; *Louisiana Power and Light Co. v. United Gas Pipe Line Co.*, CIVIL No. 84-5156, slip op. at 51 (E.D.La. Aug. 15, 1986); *Frankart Distributors, Inc. v. RMR Advertis-*

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commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." The *Holmberg* court also looked to legislative history for guidance, citing the following definition of "pattern" drawn from Senate reports:

> The concept of "pattern" is essential to the operation of the statute . . . . The target of [RICO] is . . . not sporadic activity. The infiltration of legitimate business normally requires more than one "racketeering activity" and the threat of continuing activity to be effective. It is this factor of continuity plus relationship which combines to produce a pattern.

Holmberg, slip op. at 9, quoting S.Rep.No. 617, 91st Cong. 2d Sess. 158 (1969).

ing, Inc., 632 F.Supp. 1198 (S.D.N.Y. 1986); *Simon*, slip op. at 10. The continuity prong is satisfied by proof that the defendants have committed the same or similar racketeering activities in the past or are engaged in other criminal activities elsewhere. *Superior Oil*, 785 F.2d at 257; *Holmberg*, slip op. at 9-10.[4]

Applying these principles to the case at bar, it is clear that plaintiffs have satisfied the first prong of the *Sedima* "pattern" test. Plaintiffs have alleged a "relationship" among and between the predicate acts of racketeering allegedly committed by defendants. Quite clearly, the acts allegedly committed by defendants—the alleged illicit distribution of tickets and other amenities to MPUC commissioners during the period 1981 to the present; uncompensated plane rides and excursions to Canterbury Downs during the same period; alleged illicit pay-

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[4] *See, e.g., Simon v. Fribourg*, CIVIL No. 4-86-259, slip op. at 9-10 (D.Minn. Aug. 20, 1986) wherein the court declared:

> "[P]roof of a 'pattern of racketeering activity' 'requires more than one "racketeering activity" and the threat of continuing activity to be effective. It is the factor of *continuity plus relationship* which combines to produce a pattern.'" *Superior Oil Co. v. Fulmer*, 785 F.2d 252, 257 (8th Cir. 1986) (emphasis in original) (quoting *Sedima*, 105 S. Ct. at 3275 n. 14). In *Superior Oil*, the plaintiff proved "several related acts of mail and wire fraud" in furtherance of a single crime—the conversion or theft of gas from plaintiff's pipeline. This satisfied the "relationship" prong of the *Sedima* test, but not the "continuity" prong. The failing in plaintiff's evidence was its inability to demonstrate that defendants had engaged in any other criminal activity. *Superior Oil*, 785 F.2d at 257.

Simon, slip op. at 9-10. In *Simon* the court found that plaintiff had failed to allege a civil RICO claim because the racketeering acts alleged by plaintiff were "all committed in furtherance of a single criminal act." *Simon*, slip op. at 10. In the absence of proof that the defendants had "concocted a similar scheme in any other year or that they were otherwise involved in any criminal activity" plaintiff's RICO claims must fail, the court found. *Simon*, slip op. at 10.

ments and promises of employment to MPUC commissioners Hanson and Satterlee—were related acts in furtherance of a single alleged criminal scheme, *i.e.*, all were designed to influence MPUC commissioners on behalf of Northwestern Bell.

As to the "continuity" prong of the *Sedima* test, however, plaintiffs' cause of action is much more problematical. While plaintiffs have alleged the existence of several fraudulent acts, each of these acts was committed in furtherance of a *single fraudulent scheme*. Here, as in *Superior Oil*, *Holmberg*, and *Simon*, there simply are no allegations that the defendants have engaged in "like activities in the past" or that defendants are engaged in "other criminal activities" elsewhere. *Superior Oil*, 785 F.2d at 257; *Holmberg*, slip op. at 10; *Simon*, slip op. at 10. The *Superior Oil-Holmberg* construction of the *Sedima* "pattern" test is extremely restrictive—in order to establish a pattern of racketeering activity plaintiffs must allege and prove multiple illegal schemes, of which the case at bar presents a separable episode. Each of the fraudulent acts alleged by plaintiffs was committed in furtherance of a single scheme to influence MPUC commissioners to the detriment of Northwestern Bell's ratepayers. Plaintiffs do not allege that the defendants have engaged in like wrongful activity in the past or are engaged in other wrongful activity elsewhere. *See Northern Trust Bank/O'Hare, N.A. v. Inryco, Inc.*, 615 F.Supp. 828, 832 (N.D.Ill. 1985) (the common sense interpretation of "pattern" implies acts occurring in different criminal episodes, episodes that are at least somewhat separated in time and place yet still sufficiently related by purpose to demonstrate a continuity of activity). Absent allegations of separable criminal episodes, plaintiffs' cause of action simply does not fit the RICO paradigm—the infiltration of legitimate business by criminal conduct which embraces criminal acts that have the same or similar purposes, results, participants,

victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events. It is apparent that plaintiffs have attempted to splinter a series of related acts into a civil RICO cause of action. *Professional Assets Management, Inc. v. Penn Square Bank, N.A.*, 616 F.Supp. 1418, 1423 (W.D.Okla. 1985). As such, plaintiffs' allegations fall short of establishing a "pattern" within the meaning of the RICO statute. Here, as in *Superior Oil* and *Holmberg*, "[i]t places a real strain on the language to speak of a single fraudulent effort, implemented by several fraudulent acts, as a 'pattern of racketeering activity.'" *Superior Oil*, 785 F.2d at 257; *Holmberg*, slip op. at 10. *See, e.g., Allington v. Carpenter*, 619 F.Supp. 474 (C.D.Cal. 1985) (three acts of wire fraud in connection with a single isolated fraudulent scheme comprised a single criminal episode rather than a "pattern" of racketeering activity); *Morgan v. Bank of Waukegan*, 615 F.Supp. 836, 838 (N.D.Ill. 1985) (single plot spread over several years does not satisfy the pattern requirement); *Cullen v. Nassau County Republican Committee*, II RICO Law Rptr. 564 (E.D.N.Y. 1985) (to establish pattern plaintiffs must show that crimes constituted part of a larger pattern of criminal activity); *Exeter Towers Associates v. Bowditch*, 604 F.Supp. 1547 (D.Mass. 1985) (two acts of mail fraud in connection with the purchase of a single mortgage does not constitute a pattern); *Teleprompter of Erie, Inc. v. City of Erie*, 537 F.Supp. 6 (W.D.Pa. 1981) (multiple bribes received by councilman at a political fundraiser did not constitute a pattern).

Plaintiffs cite various decisions of other courts in other circuits where proof of various predicate acts engaged in over a significant period of time has been held to satisfy the "pat-

tern" requirement of civil RICO.[5] *See Illinois Dept. of Revenue v. Phillips*, 771 F.2d 312, 313 (7th Cir. 1985) (defendants' act of mailing nine fraudulent tax returns over a nine-month period constitutes pattern of racketeering); *First Federal Savings and Loan Association of Pittsburgh v. Oppenheim, Appel, Dixon & Co.*, 629 F.Supp. 427, 445 (S.D.N.Y. 1986) (predicate mail fraud acts arising out of a single scheme constitute pattern); *Pappagiannis v. Pontikis*, 105 F.R.D. 177 (N.D.Ill. 1985) (perpetration of fraud on more than one victim constitutes pattern); *United States v. Freshie Co.*, 639 F.Supp. 442 (E.D.Pa. 1986) (related but distinct methods of criminal activity engaged in over a substantial period of time rose to the level of a pattern of racketeering activity). Were the Court writing on a clean slate, these cases might well be persuasive. In the Eighth Circuit, however, the slate is far from clean.[6] *Superior Oil* and *Holmberg* are on all

[5] In a recent decision, *Morgan v. Bank of Waukegan*, 55 U.S.L.W. 2255 (7th Cir. Oct. 23, 1986), the United States Court of Appeals for the Seventh Circuit noted that the "continuity" aspect of the pattern requirement in the aftermath of *Sedima* footnote 14 has created a conflict among the circuits. The Eleventh Circuit has rejected the proposition that the predicate acts must occur in different criminal episodes or schemes, *Bank of America v. Touche Ross & Co.*, 782 F.2d 966 (11th Cir. 1986), while in contrast the Eighth Circuit has held that where all predicate acts were committed in furtherance of a single scheme the continuity requirement has not been met, as discussed above. In *Morgan* the Seventh Circuit elected to steer the middle ground, holding that "[i]n order to be sufficiently continuous to constitute a pattern of racketeering activity, the predicate acts must be ongoing over an identified period of time so that they can fairly be viewed as constituting separate transactions, *i.e.*, 'transactions 'somewhat separated in time and place.'' . . .

[6] One court has identified three positions which the courts have taken in construing the continuity and relationship test. At one extreme, plaintiff is required to prove that the defendant was engaged in multiple illegal schemes. This is the position taken by the Eighth Circuit in *Superior Oil* and *Holmberg*. At the other extreme, courts have held that allegations of two related predicate acts is sufficient. An intermediate position taken by some courts requires proof of multiple criminal episodes evincing an ongoing practice or activity. *See Louisiana Power and Light*, slip op. at 52-53.

fours with the instant case. Under *Superior Oil* and *Holmberg*, plaintiffs have failed to show the requisite "continuity." Accordingly, plaintiffs' RICO claims must be dismissed.

Although plaintiffs' failure to satisfy the continuity prong of the *Sedima* pattern test is fully dispositive of plaintiffs' RICO claims, in the interest of thoroughness, certain of defendant's remaining arguments for dismissal will be briefly addressed.

2. *Enterprise-Person Distinction*

RICO was passed as part of the Organized Crime Control Act. *United States v. Hartley*, 678 F.2d 961, 987 (11th Cir. 1982). Its primary purpose was "to eradicate organized crime and corruption." *United States v. Lee Stroller Enterprises, Inc.*, 652 F.2d 1313, 1317 (7th Cir. 1981). In *United States v. Turkette*, 452 U.S. 576 (1981), the United States Supreme Court interpreted RICO as requiring proof of an "enterprise" engaged in a "pattern of racketeering activity." 452 U.S. at 583. "Enterprise" as defined in 18 U.S.C. § 1961(4) "includes any partnership, corporation, association, or other legal entity, any union or group of individuals associated in fact although not a legal entity." Under *Turkette*, the existence of such an enterprise must be established by "evidence that the various associates function as a continuing unit." *Turkette*, 452 U.S. at 583. Moreover, the enterprise must be shown to have an existence "separate and apart from the pattern of activity in which it engages." *Turkette*, 452 U.S. at 583; *Bennet v. E.F. Hutton, Inc.*, 597 F.Supp. 1547, 1559 (N.D.Ohio 1984).

Defendant moves for dismissal of plaintiffs' Count II on the ground that Count II names Northwestern Bell as both the "person" and the "enterprise" for purposes of plaintiffs' section 1962(a) claim. Defendant argues that Northwestern Bell cannot be both the "person" and the "enterprise" and that Count II is thus fatally defective.

RICO proscribes conduct in which one party, the "person" subject to the statute, acts upon an entity, the "enterprise," in such a manner that the enterprise's affairs are conducted through a pattern of racketeering. *Bennett v. Berg*, 685 F.2d 1053, 1061 (8th Cir. 1982). While some courts have held that a legal entity or formal enterprise which has actively participated and benefited from a pattern of racketeering activity can be named as *both* the enterprise and the person, *see United States v. Hartley*, 678 F.2d 961 (11th Cir. 1982), the majority position, and the one adopted in this circuit and district, is that the RICO "enterprise" cannot also be the RICO "person." *See Rae v. Union Bank*, 725 F.2d 478, 481 (9th Cir. 1984); *United States v. Computer Sciences Corp.*, 689 F.2d 1181, 1190 (4th Cir. 1982). In *Bennett v. Berg*, 685 F.2d 1053 (8th Cir. 1982), the Eighth Circuit dismissed one count of plaintiff's complaint for failure to draw a distinction between the RICO enterprise and the RICO person. The *Bennett* ruling was reaffirmed in *Alexander Grant & Co. v. Tiffany Industries, Inc.*, 742 F.2d 408, 411 n.6 (8th Cir. 1984), *vacated on other grounds and remanded for reconsideration in light of Sedima*, 105 S.Ct. 3550 (1985), *on remand* 770 F.2d 717 (1985), where the court stated:

> We do observe that [plaintiff's] original complaint alleges that [defendant] is both a "person" and an "enterprise" within the meaning of section 1962(c). It was precisely because of the possibility of such an identity

> that we held that count II of the complaint in *Bennett v. Berg* [citation omitted] failed to state a claim.

In *Minnesota Odd Fellows Home Foundation v. Engler & Budd Co.*, 630 F.Supp. 797 (D.Minn. 1986), the court found that "in the Eighth Circuit, it is necessary to allege an 'enterprise' separate from the 'person' who allegedly associates with the enterprise." *Odd Fellows*, 630 F.Supp. at 800, *citing Bennett v. Berg*, 685 F.2d at 1089. Because plaintiff in that case had failed to allege the existence of an "enterprise" separate and distinct from the "person" associated with the enterprise, the court dismissed plaintiff's RICO claims.

Plaintiffs' Count II alleges:

> 48. Northwestern Bell Telephone Company is a person within the meaning of 18 U.S.C. 1961(3).
>
> 49. The person referred to in paragraph 48 is also an ongoing enterprise within the meaning of 18 U.S.C. 1961(4).

Amended Complaint ¶¶ 48, 49. Quite clearly, plaintiffs have failed to allege a RICO "enterprise" separate and distinct from a RICO "person." Plaintiffs argue, however, that *Bennett* is not controlling in that the *Bennett* plaintiff's cause of action arose under section 1962(c) of RICO, whereas plaintiffs' Count II arises under section 1962(a). Some courts have held that in actions arising under section 1962(a) the enterprise and the person need not be distinct. *See, e.g., B.F. Hirsch v. Enright Refining Co.*, 751 F.2d 628 (3d Cir. 1984); *United States v. Freshie Co.*, 639 F.Supp. 442 (E.D.Pa. 1986). Other courts have held that the person-enterprise distinction pertains to 1962(a) actions as well as 1962(c) actions. *See, e.g., Kredietbank, N.V. v. Joyce Morris, Inc.*, CIVIL No. 84-1903 (D.N.J. Jan. 9, 1986); *Rush v. Oppenheimer & Co.*, 628 F.Supp 1188, 1196-98 (S.D.N.Y. 1985); *Computer Sciences*, 689 F.2d at 1190. The Court finds that in a 1962(a) action,

as in a 1962(c) action, plaintiff must allege the existence of an "enterprise" separate and distinct from the "person" identified, for the following reasons:

(1) Both 1962(a) and 1962(c) speak[7] of a "person" committing an unlawful act in connection with, but distinct from, an "enterprise." The consistent use of the two different terms "person" and "enterprise" throughout section 1962 indicates an intent to distinguish those actors throughout.

(2) As stated in *Bennett v. Berg*, "the RICO act proscribes conduct in which one party, the 'person' subject to the statute, acts upon an entity, the 'enterprise' . . . ." *Bennett*, 685 F.2d at 1061. In making this statement, the Eighth Circuit did not distinguish between (a) and (c) of section 1962, and nothing in *Bennett* gives rise to an inference that the court would view section (a) differently from section (c) for purposes of the separate person-enterprise requirement. Absent proof of a

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[7] RICO section 1962(a) provides:

> It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity . . . in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. . . .

The thrust of section 1962(a) is a proscription on the use or investment of illegally acquired funds in an enterprise.

RICO, section 1962(c) provides:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

The thrust of section 1962(c) is wrongful association with and control of an "enterprise' by a "person."

"person" acting upon an "enterprise," RICO is inapplicable, by virtue of the plain language of *Bennett*.

(3) Permitting a RICO cause of action where it is alleged that a corporate entity has conducted its own affairs through a pattern of racketeering activity, without any proof of infiltration of that enterprise by outside "persons," would not comport with congressional intention, inasmuch as one of the primary purposes of Congress in enacting RICO was to prevent the takeover of legitimate business by criminals and corrupt organizations. *B.F. Hirsch*, 751 F.2d at 633.

(4) Sections (a) and (c) of 1962 require the presence of the same elements—conduct of an enterprise, a pattern of racketeering activity, and a person. Only the relationship among these elements differs. Section (c) envisions racketeering acts conducted through an enterprise, whereas section (a) portrays the enterprise as the investment object of the criminal violators. Under either (a) or (c), the enterprise must be acted upon by a distinct "person."

(5) A construction of (a) which would obviate the separate enterprise-person requirement would be contrary to the restrictive reading of RICO given by the Eighth Circuit in *Superior Oil* and *Holmberg* and would "aggravate the already hopeless deviation of the RICO statute from its intended purpose in ferre''ng out organized crime." *Rush v. Oppenheimer & Co.*, 628 F.Supp. 1188, 1197 (S.D.N.Y. 1985).

Accordingly, based on the foregoing, the Court finds that plaintiffs' Count II is deficient as a matter of law.

D. *Filed Rate Doctrine*

Northwestern Bell argues that dismissal of plaintiffs' RICO claims is necessitated by the federal "filed rate" doctrine. In *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246 (1951), the Supreme Court affirmed the

district court's dismissal of an action predicated on allegations that plaintiffs were forced to pay unreasonably high rates due to misrepresentations made by the defendant in rate proceedings before the Federal Power Commission (FPC). The Supreme Court held that the FPC had exclusive authority to determine a reasonable rate, and that the FPC's decision was conclusive. In *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1981), the Supreme Court reversed the trial court's award of damages measured by the difference between the price defendant had to plaintiff pursuant to Federal Energy Regulatory Commission (FERC) approved rates and the price defendant had paid others. The Court held that the "filed rate" doctrine forbids an award of damages based on an estimation of what the FERC "might have done had it been faced with the facts of [the] case." *Arkansas Gas*, 453 U.S. at 578-79. Northwestern Bell also relies on a line of federal antitrust cases, wherein the courts have held that antitrust plaintiffs are precluded from obtaining damages based on alleged illegal price fixing of utility rates, where the alleged damages are measurable by a comparison of the approved tariff and the tariff that would have been approved absent defendant's wrongdoing. *See Keough v. Chicago & Northwestern Ry.*, 260 U.S. 156, 163 (1922); *Square D Co. v. Niagra Frontier Tariff Bureau, Inc.*, 106 S.Ct. 1922 (1986). Northwestern Bell argues that the *Keough* line of antitrust cases has relevance to a RICO action because (1) both RICO and the Clayton Act grant a cause of action to one "injured in his business or property," and because (2) both RICO and the Clayton Act provide for the award of treble damages. Defendant argues that the analogous nature of the Clayton Act and RICO remedies make the *Keough* line of cases of valid precedential authority in a RICO case.

Montana-Dakota, *Arkansas Gas*, and the *Keough* line of cases are squarely on point with plaintiffs' RICO claims. Plaintiffs seek to recover damages measurable by a comparison of MPUC-approved rates and the rates that would have been approved but for defendants' wrongdoing. Under the "filed rate" doctrine, plaintiffs' cause of action is not federally cognizable. The MPUC has exclusive authority to determine a reasonable rate, and the MPUC's decision is conclusive, subject to statutory process. Even assuming that plaintiffs have satisfied the "continuity" prong of *Sedima*, plaintiffs' action must be dismissed by virtue of the filed rate doctrine.

E. *State Law Claims*

Plaintiffs' Count I is a state law claim arising under Minn. Stat. § 609.42 and the common law of bribery. In *United Mine Workers of America v. Gibbs*, 383 U.S. 715 (1966), the seminal case on the pendent jurisdiction of the federal courts, the United States Supreme Court stated that "if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well." 383 U.S. at 726. This bold statement has been subsequently qualified somewhat, the Court stating in *Rosado v. Wyman*, 397 U.S. 397 (1970) that whether to proceed with state claims lacking an independent basis of federal jurisdiction after all federal claims have been dismissed is discretionary with the trial court. 397 U.S. at 404; *Silva v. Vowell*, 621 F.2d 640 (5th Cir. 1980); *McGann v. Mungo*, 578 F.Supp. 1413 (D.S.C. 1982). Factors to consider in the exercise of the Court's discretion include considerations of judicial economy, convenience and fairness to litigants, and the avoidance of needless decisions of state law. *Gibbs*, 383 U.S. at 726. *Reyes v. Edmunds*, 416 F.Supp. 649 (D.Minn. 1976). *See also Koke v. Stifel, Nicolaus & Co.*, 620 F.2d 1340, 1346 (8th Cir. 1980)

(adopting *Gibbs* factors); *Pink Supply Corp. v. Hiebert, Inc.*, 612 F.Supp. 1334, 1347 (D.Minn. 1985).

Each of the relevant factors supports dismissal of plaintiffs' pendent state law claims. The case is still at an early stage, so that there has been no substantial commitment of federal judicial resources. *See, e.g., Briggs v. American Air Filter Co.*, 455 F.Supp. 179 (N.D.Ga. 1978) (no substantial commitment of judicial resources to nonremovable claims); *Houlihan v. Anderson-Stokes, Inc.*, 434 F.Supp. 1324, 1329 (D.D.C. 1977) (federal claims dismissed at early stage). Count I of the amended complaint raises an issue of first impression as to the implication of a private cause of action under the Minnesota criminal bribery statute. Needless decision of this unsettled state law issue is best avoided. *Girard v. 94th Street & Fifth Ave. Corp.*, 530 F.2d 66 (2d Cir.), *cert. denied*, 425 U.S. 974 (1976); *Briggs*, 455 F.Supp. at 82 (novel questions of state law). In sum, no "unusual circumstances," *Nolan v. Meyer*, 520 F.2d 1276, 1280 (2d Cir.), *cert. denied*, 423 U.S. 1034 (1975), justifying federal jurisdiction over the pendent state claims are present here. Consequently, plaintiffs' Count I will be dismissed without prejudice as outside the subject matter jurisdiction of the Court. *See Kuhn v. National Association of Letter Carriers, Branch 5*, 570 F.2d 757, 761 (8th Cir. 1978) (district court did not have power to consider pendent state claim because it did not have jurisdiction over the federal claim).

Based on the foregoing, and upon all the files, records, and proceedings in this matter,

IT IS ORDERED that:

1. plaintiffs' motion to strike defenses is denied;

2. defendant's motion to dismiss Counts II-V of plaintiffs' amended complaint is granted; and

3. defendant's motion to dismiss Count I of plaintiffs' amended complaint is granted, and Count I is dismissed without prejudice.

LET JUDGMENT BE ENTERED ACCORDINGLY.

HARRY H. MacLAUGHLIN
Judge
United States District Court

DATED: November 21, 1986.

No. 87-1252

Supreme Court, U.S.
FILED
FEB 29 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

H.J. INC., a Minnesota corporation, KIRK DAHL, LARRY KRUGEN and MARY KRUGEN, individually and d/b/a PHOTO IMAGES, SUSAN DAVIS, ROBERT NEAL, ISAAC H. WARD, RICHARD L. ANDERSON, THOMAS J. MOTT, and all others similarly situated,

Petitioners,

vs.

NORTHWESTERN BELL TELEPHONE COMPANY, a subsidiary of U.S. West, A.B.C. individually and D.E.F. as corporations, and other unnamed Co-conspirators,

Respondents.

BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Respondents.

BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Respondent Northwestern Bell Telephone Company respectfully submits this brief in opposition to petitioners' petition for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

RESTATEMENT OF THE CASE

A. Proceedings Below

This action was commenced in July 1986 on behalf of a purported plaintiff class of all purchasers of "telecommunications goods and services" from respondent Northwestern Bell Telephone Company ("Northwestern Bell") between 1980 and 1986. Petitioners alleged that Northwestern Bell had engaged in dealings with members of the Minnesota Public Utilities Commission ("the MPUC" or "the Commission") that constituted bribery in violation of the

Minnesota criminal bribery statute, Minn. Stat. § 609.42. They claimed a right of action for damages on account of this alleged activity both directly under the Minnesota statute and on the theory that, because of the alleged bribery, Northwestern Bell had violated several provisions of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968. In a single allegation applicable to all legal theories, petitioners averred that the supposed violations injured all members of the alleged class in that the rates each of them was required to pay for Northwestern Bell's services pursuant to orders of the MPUC exceeded the rates that were "fair and reasonable"; petitioners sought to have the trial court determine what were "fair and reasonable" rates

and award them as damages their payments in excess of those court-determined rates.

Northwestern Bell filed an answer denying that it had violated any law in its dealings with the MPUC. It then moved to dismiss all or various parts of petitioners' first amended complaint on a number of different grounds.

By Order dated November 21, 1986, the District Court granted respondent's motion. The District Court ruled on only three of the numerous grounds for dismissal urged by Northwestern Bell.[1] It held:

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1 Grounds for dismissal asserted by Northwestern Bell but not adjudicated by

(FOOTNOTE Continued On Next Page)

(1) that the averments of the first amended complaint failed to state a "pattern of racketeering activity" under RICO; (2) that petitioners' allegations under section 1962(a) of RICO failed to state a claim, in that Northwestern Bell was alleged to be

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1 (FOOTNOTE Continued From Previous Page)

the District Court included, inter alia, the contentions that the MPUC is not an "enterprise" within the meaning of 18 U.S.C. §§ 1962(b) and (c); that Northwestern Bell does not have the necessary "interest in or control of" the MPUC within the meaning of section 1962(b); and that Northwestern Bell is not "employed by or associated with" the MPUC within the meaning of section 1962(c). Northwestern Bell also argued to the District Court that petitioners' effort to revise telephone rates collaterally, if not barred altogether by the "filed rate" doctrine, at least raised factual issues within the primary jurisdiction of the MPUC, and that this action should be dismissed or stayed pending the MPUC's exercise of its jurisdiction.

both the "person" and the "enterprise" under that section; and (3) that, even if petitioners had adequately alleged violations of RICO, their claims under the statute were barred by the "filed rate" doctrine, because they sought to have the trial court establish that the "reasonable" rates for respondent's services were something other than the rates promulgated by the MPUC. 648 F. Supp. 419 (D. Minn. 1986). Accordingly, the District Court dismissed petitioners' RICO claims with prejudice.[2]

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2 The District Court declined to exercise pendent jurisdiction over petitioners' claim for alleged violation of the Minnesota bribery statute, which it dismissed without prejudice.

Plaintiffs made a timely motion pursuant to Rule 59(e), F.R.Civ.P., to "alter or amend" (i.e., reconsider) the judgment of dismissal. The District Court denied that motion by Order dated February 18, 1987. 653 F. Supp. 908 (D. Minn. 1987).[3]

Thereafter, petitioners appealed to the United States Court of Appeals for the

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3 Petitioners did not seek leave to replead their RICO allegations when they moved for reconsideration of the District Court's judgment of dismissal. After their suit was dismissed, petitioners filed a virtually identical action in state court, again making no material revision in their RICO claims. H.J. Inc., et al. v. Northwestern Bell Corp., et al., No. 86-24166 (Minn. Dist. Ct., 4th Jud. Dist., Lebedoff, J.). Petitioners' state court action likewise has been dismissed by the trial court, and that dismissal is presently pending on appeal before the Minnesota Intermediate Court of Appeals.

Eighth Circuit. On September 22, 1987, the Court of Appeals filed its opinion affirming the District Court based on petitioners' failure to allege a RICO "pattern of racketeering activity." 829 F.2d 648 (8th Cir. 1987). On October 23, 1987, petitioners' petition for rehearing and rehearing en banc was denied by the Court of Appeals. Petitioners now seek a writ of certiorari from this Court.

B. Factual Allegations

Because this action was disposed of on the pleadings in the District Court, there is no factual record. As the Court of Appeals recognized, of course, because petitioners' first amended complaint was dismissed pursuant to Rule 12(b)(6), F.R.Civ.P., the facts alleged in that

complaint must be viewed "in the light most favorable to them" (829 F.2d at 649). However, Northwestern Bell emphatically denies any illegality in its dealings with the MPUC and is confident that, if this action ever were brought to trial, petitioners' allegations would be shown to be factually as well as legally groundless.

In essence, petitioners' first amended complaint averred that Northwestern Bell provided bribes to certain members of the MPUC so as to influence the Commission's actions and enable Northwestern Bell to overcharge consumers of telephone services

in the State of Minnesota.[4] All of the purported predicate acts of racketeering

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4 Petitioners' first amended complaint (¶ 30) stated that Northwestern Bell "has attempted to, or did offer, gave or promised to give, directly or indirectly, to the public officials who were duly appointed commissioners of the Public Utilities Commission, benefits, rewards, and consideration, to which they were not legally entitled, with the intent to influence such officers with respect to the performance of their powers and duties as such officers of said commission." The supposed instances of such activity by Northwestern Bell were set forth in paragraphs 31 through 42 of the first amended complaint, and each such instance was utilized as a purported predicate act of bribery for purposes of petitioners' RICO claims under 18 U.S.C. §§ 1962(a)-(d) alleged in counts II through V. Petitioners asserted injury in their business or property on the basis that "the compensation Northwestern Bell was allowed to receive by the [MPUC] was in excess of what would be fair and reasonable charges to [petitioners] and members of the class, and that said unfair and unreasonable compensation was caused by the involvement in bribery, attempts to bribe, conspiracy and racketeering activities alleged in [the first amended] complaint" (¶ 75).

activity in which Northwestern Bell allegedly engaged were substantively of the same nature and for the same purpose according to petitioners' first amended complaint. Fairly read, petitioners' first amended complaint contended that Northwestern Bell participated in a single criminal scheme comprised of multiple acts of bribery for a common objective, resulting in petitioners' claimed injury. The courts below simply refused to compartmentalize and segregate the alleged predicate acts artificially in order to manufacture a "pattern of racketeering activity."

REASONS FOR DENYING THE WRIT

I. Any Confict That Exists Among The Circuits Regarding The Interpretation Of The RICO "Pattern" Requirement Need Not Be Resolved By This Court

Petitioners argue that the Courts of Appeals have taken varying approaches in construing the "pattern of racketeering activity" requirement of RICO. While it is true that their interpretation of "pattern" has not been uniform, this Court made clear in Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 499 (1985), that, as to "defect[s] . . . inherent in the statute as written, . . . correction must lie with Congress." Indeed, the Court in Sedima challenged "Congress and the courts to develop a meaningful concept of 'pattern'" (id. at 500), emphasizing that, "while two acts [of racketeer-

ing activity] are necessary, they may not be sufficient" to form a "pattern," and that it is the "'factor of continuity plus relationship which combines to produce a pattern'" (id. at 496 n.14).

In the aftermath of Sedima, the United States Court of Appeals for the Eighth Circuit has required that the element of "continuity" be established in order to allege adequately a "pattern of racketeering activity" within the ambit of the statute. Although petitioners contend that the Eighth Circuit's view of "pattern" is at odds with other federal courts, the United States Court of Appeals for the Tenth Circuit also has stressed the requisite combination of "continuity" and "relatedness" in order

to state a "pattern." See, e.g., Garbade v. Great Divide Mining and Milling Corp., 831 F.2d 212, 214 (10th Cir. 1987); Condict v. Condict, 826 F.2d 923, 927-929 (10th Cir. 1987); Torwest DBC Inc. v. Dick, 810 F.2d 925, 927-929 (10th Cir. 1987). Likewise, the United States Court of Appeals for the Second Circuit has demanded that the claimed RICO "enterprise" be sufficiently "continuous" to satisfy the Sedima standard. See, e.g., Creative Bath Products, Inc. v. Connecticut General Life Insurance Co., No. 87-7463 (2d Cir. Jan. 20, 1987), reported in BNA Civil RICO Report at 3 (Vol. 3, No. 34 Feb. 2, 1988); Albany Insurance Co. v. Esses, 831 F.2d 41, 44 (2d Cir. 1987); Furman v. Cirrito, 828 F.2d 898, 902-903 (2d Cir. 1987);

Beck v. Manufacturers Hanover Trust Co., 820 F.2d 46, 51-52 (2d Cir. 1987), cert. denied, _____ U.S. _____, 98 L. Ed. 2d 650 (1988). The Eighth Circuit's approach to the RICO "pattern" requirement is consistent with the statutory language as interpreted by this Court in Sedima, and is in keeping with the attempts of other Courts of Appeals to ensure that the factor of "continuity" is present and thus that the limiting, mandatory concept of "pattern" is "meaningful."

The Eighth Circuit's treatment of the "pattern" element has been presented to this Court on several occasions, and in each instance the requested writ of certiorari has been denied. See, e.g., Madden v. Gluck, 815 F.2d 1163 (8th Cir.), cert. denied, ____ U.S. ____,

98 L. Ed. 2d 48 (1987); Holmberg v. Morrisette, 800 F.2d 205 (8th Cir. 1986), cert. denied, ____ U.S. ____, 95 L. Ed. 2d 526 (1987). Similarly, this Court, following its admonition that Congress must act to correct deficiencies inherent in the statute, has denied certiorari in "pattern" cases arising from other Circuits. See, e.g., HMK Corp. v. Walsey, 828 F.2d 1071 (4th Cir. 1987), cert denied, ____ U.S. ____, 98 L. Ed. 2d 657 (1988); California Architectural Building Products, Inc. v. Franciscan Ceramics, Inc., 818 F.2d 1466 (9th Cir. 1987), cert. denied, ____ U.S. ____, 98 L. Ed. 2d 650 (1988); United States v. Ianniello, 808 F.2d 184 (2d Cir. 1986), cert. denied, ____ U.S. ____, 97 L. Ed. 2d 736 (1987). Here, too, the writ of certiorari sought by petitioners should be

denied. The Courts of Appeals are continuing to develop the "pattern" requirement as suggested in Sedima, and intervention in that process by this Court at this time is unwarranted. If greater uniformity under RICO is to be achieved, it should be accomplished by Congress, as this Court has recognized.

II. This Case Is An Inappropriate Vehicle To Resolve Any Conflict That May Exist Among The Circuits As To The Meaning Of RICO's "Pattern" Requirement

Even if this Court were desirous of reconciling the varying approaches of the Courts of Appeals to the meaning of "pattern" under RICO, this case would be an inappropriate vehicle for that purpose. As acknowledged by the District Court, and upheld by the Court of Appeals, dismissal of petitioners' first amended

complaint (which concerned one alleged corporate perpetrator -- Northwestern Bell, one type of purported illegal activity -- bribery, one claimed target entity -- the MPUC, one supposed central objective -- obtaining remuneration in excess of "fair and reasonable" charges, and one unitary, identifiable group of alleged victims -- Northwestern Bell's Minnesota ratepayers) was commanded by and squarely in line with Eighth Circuit precedent construing RICO's "pattern of racketeering activity" requirement.

Nevertheless, in their motion for reconsideration of the Order of dismissal, petitioners asked the District Court to take cognizance of those factors and tests allegedly relied on by federal courts in other Circuits in analyzing the question of "pattern." In denying

petitioners' motion for reconsideration, the District Court did precisely as petitioners requested, and nonetheless came to the same conclusion, i.e., that their first amended complaint should be dismissed for failure to state a "pattern" (653 F. Supp. at 915-916):

> "Even assuming that these factors have relevance, the Court would still be constrained to find that [petitioners] have not alleged a pattern of racketeering activity. [Petitioners] have alleged criminal activity of long duration. Whether [petitioners] have alleged the threat of continuing criminal activity is a closer question, particularly in view of the review by the MPUC of its past actions. [Petitioners] have alleged the presence of multiple victims, assuming that the body of Northwestern Bell ratepayers is not one corporate victim, but has not shown independent harmful significance, since it is the aggregate of predicate acts which produce their injuries. [Petitioners] have alleged various methods of commission. It cannot be said, however, that the alleged

> 'pattern' of predicate acts is a 'regular part of the way' [respondents] conduct their business. On balance, the Court finds that, applying the enumerated factors, [petitioners'] allegations do not fit the RICO paradigm."

Thus, even within the interpretation of "pattern" which they urged the District Court to apply, petitioners have not stated a claim under RICO on which relief can be granted.

Moreover, in addition to the "pattern" challenge raised by respondent, numerous other grounds were advanced to the District Court for dismissal of petitioners' action (see note 1, supra), and, while the District Court found it unnecessary to address many of respondent's arguments, it did find alternative bases for its decision in that (1) petitioners' RICO claim under 18 U.S.C. § 1962(a) was fatally defective

because of the identity of "person" and "enterprise," and (2) that the "filed rate" doctrine barred all of petitioners' RICO claims. See 648 F. Supp. at 426-429. Therefore, even if the "pattern of racketeering activity" issue were resolved in petitioners' favor, it would not save their first amended complaint from the fate of dismissal.

CONCLUSION

Petitioners' contentions have been fairly aired in both the federal courts and the courts of the State of Minnesota. It is time to give those contentions the repose they deserve. Further review by this Court is not justified. For all the foregoing reasons, the petition for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit should be denied.

Dated: February 29, 1988

Respectfully submitted,

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PETITIONERS' RESPONSE BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESTATEMENT OF THE CASE

Petitioners must reply to a number of Respondents' arguments contained in their Brief in Response to Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit, hereinafter referred to as Response Brief. Respondents allege on page 11 that "fairly read, Petitioners' First Amended Complaint contended that Northwestern Bell participated in a single criminal scheme comprised of multiple acts of bribery for a common objective, resulting in Petitioners' claimed injury." It is true that the Eighth Circuit affirmed the district court, and following Eighth Circuit precedent, found that Petitioners' complaint alleged a series of fraudulent acts which were committed in furtherance of a single scheme and that that scheme was to influence Minnesota Public Utilities Commissioners. *H. J. Inc. v. Northwestern Bell Telephone Company*, 829 F.2d 648, 650 (8th Cir. 1987). However, this Court should be aware that the Minnesota courts have already broken Respondent's activity into separate schemes.

In *Matter of Minnesota Public Utilities Commission*, 417 N.W.2d 274 (Minn. App. 1987), the Minnesota Court of Appeals considered an appeal where the Minnesota Public Utilities Commission took new action regarding a 1984 Northwestern Bell rate order. In *Matter of Minnesota Public Utilities Commission*, the Minnesota Public Utilities Commission determined that the number and timing of ex parte contacts between Northwestern Bell and the Commissioners sustained an inference that Northwestern Bell's actions were intended to influence the commission's decision regarding the specific 1984 rate increase. In other words, it was a scheme in and of itself. This 1984 rate order is one of the rates alleged by Petitioners to have been affected by an individual scheme

of bribery. Specifically the 1984 rate-bribery scheme involved the actions alleged in paragraph 37 of Petitioners' Complaint. Other acts of bribery alleged in Petitioners' Complaint constituted separate schemes involving different actors, aimed at other rates.

REASONS FOR GRANTING THE WRIT

I. This Court should resolve the conflict in the circuits regarding the RICO "pattern requirement."

Respondent's acknowledge that the interpretation of "pattern" has not been uniform by the district and circuit courts. See Response Brief, page 12. Respondents however argue that this Court in *Sedima, S.P.R.L. v. Imrex Company*, 473 U.S. 479, 500 (1985) challenged "Congress and the courts to develop a meaningful concept of 'pattern'." Respondents argue that the courts of appeals are continuing to develop this pattern requirement and that intervention by this Court at this time is unwarranted. Response Brief, p. 17.

It may be true that the lower courts should develop a "meaningful" concept of pattern. However, in *Sedima*, this Court specifically noted in 1985 that both Congress and the courts had failed to do so. In the last three years, Congress has continued in its failure to clarify "pattern." The circuit courts have developed at least three approaches to interpreting the RICO pattern requirement. See Petitioners' Brief, pages 8-11 for discussion of these approaches. In developing these approaches, the courts have shown a lack of ability to develop a "meaningful" interpretation. Surely, an element of any "meaningful" interpretation would be some consistency in approaches to this requirement. However the circuits have shown a total lack of consistency, the result of which is to

place differing burdens on RICO plaintiffs depending on the circuit in which the case is brought. This is most distressing in light of the fact that these different burdens also apply to criminal defendants brought into court under the RICO statute. Clearly these different interpretations raise constitutional questions regarding unequal treatment when applied to criminal defendants. The development of the interpretation of the pattern requirement by the circuit courts has not been "meaningful" and this Court should intervene and provide some direction in its interpretation.

Respondents also suggest that if greater uniformity under RICO is to be achieved, it should be accomplished by Congress. Response Brief, p. 17. However, Congress has had ample opportunity to address this issue and has not done so, leaving litigants in different circuits unable to devine the meaning of pattern. This Court has graciously allowed Congress three years to act; that failure to act further illustrates the necessity for interpretation by this Court.

Respondents also allege that the Eighth Circuit approach to the RICO pattern requirement is consistent with the statutory language as interpreted by this Court in *Sedima*. Response Brief, p. 15. However, nothing in the statute requires that there be a multiple scheme or multiple episode test for the showing of a pattern. The Eighth Circuit's interpretation is not consistent with the RICO statutory language. This has been acknowledged even within the Eighth Circuit. Judge John R. Gibson has specifically stated "that the multiple scheme requirement that we have grafted onto the pattern element strays from the statutory language of RICO." *H. J. Inc. v. Northwestern Bell*, 829 F.2d 648, 651 (8th Cir. 1987) (Gibson, J. concurring). Other courts have noted that this requirement is not in keeping with the RICO statutory language:

> It should also be noted that the section 1961(5) definition of pattern requires at least two acts of racketeering activity, not two schemes. "Racketeering activity" is in turn defined as various statutory violations in section 1961(1), which has no language requiring a scheme. *See* 18 U.S.C. § 1961(1) (1982). Clearly then, the multiple scheme requirement is not grounded in the statutory language of RICO.

United States v. Ianniello, 808 F.2d 184, 192 n. 16 (2nd Cir. 1986). *Accord, Sun Savings and Loan Association v. Dierdorff*, 825 F.2d 187, 193 (9th Cir. 1987) ("neither RICO's language nor *Sedima's* interpretation of it supports a requirement of substantive unconnectedness, i.e., separate episodes or schemes."); *Lawaetz v. Bank of Nova Scotia*, 653 F.Supp. 1278, 1286 (D. Virgin Islands 1987) ("RICO's language and legislative history are devoid of a multiple episode requirement.").

A "multiple scheme" requirement for a showing of the pattern also conflicts with other portions of the RICO statute. This conflict is specifically found if the single scheme limitation of the Eighth Circuit is applied to § 1962(b), which deals with the takeover of an enterprise (a § 1962(b) count was pleaded in the instant case). The specific provision represents the principle purpose of the RICO statute. See *Russello v. United States*, 464 U.S. 16, 28 (1983); *United States v. Turkette*, 452 U.S. 576, 591 (1981). Under the Eighth Circuit's test, no racketeering activity would be found where the acts were pursuant to a single scheme. Section 1962(b) would effectively be read out of the statute:

> This provision does not prohibit an enterprise which is committing predicate acts; rather it prohibits predicate acts which are aimed at taking over an enterprise . . .

> It prohibits one scheme to acquire an interest in an interstate enterprise. To require two schemes as part of the *definition* of pattern under § 1961(5) would effectively eliminate this provision.

Ianniello, 808 F.2d at 192 (footnote omitted).

Similarly, requiring a multiple scheme to create a pattern of racketeering activity potentially conflicts with § 1962(d) which is the conspiracy section of the RICO statute (also pleaded in the instant case). A requirement of multiple schemes might defeat a single conspiracy charge and conversely, a showing of a single conspiracy may well preclude a finding of multiple schemes and thus a pattern. Such results would be untennable and clearly not within the contemplation of Congress. This is especially true in applying the RICO statute to criminal defendants.

II. This case is an appropriate vehicle to resolve the conflict that exists among the circuits regarding the RICO pattern requirement.

Respondents argue that even if this Court were desireous of reconciling the conflict among the circuits regarding the pattern requirement, this case would be an inappropriate vehicle to do so. Respondents allege that even with the interpretation of pattern which appellants urge the district court to apply that petitioners would not have stated a claim for relief upon which RICO could be granted. Response Brief, pp. 17-20. However, the Eighth Circuit in affirming the district court decision did not consider interpretations of the pattern statute by other circuits. Rather, the court considered whether the pattern requirement was met specifically only under the Eighth Circuit's interpretation. See *H. J. Inc. v. Northwestern Bell*, 829 F.2d 648 (8th Cir. 1987). It is clear in reviewing interpretations from other circuits that Petitioners' complaint would be upheld under other interpretations. See Petitioners' Brief, pages 15-17. Furthermore, the district court noted in its November 21, 1986 opinion that other circuits apply different interpretations of the pattern requirement. The court, after discussing other courts' interpretations, noted "were the Court writing on a clean slate, these cases might well be persuasive." Petitioners' Brief Appendix A-38.

Respondents also advance the *Keogh* and filed rate doctrines as additional reasons why this Court should not grant certiorari in the instant case; that is, Respondents allege that Petitioners' case would fail on these separate grounds. Response Brief, p. 21. Petitioners wish to point out, however, that this issue was not addressed by the Eighth Circuit, and therefore is not before this Court. However, even more importantly, Respondents themselves have admitted that there is a serious question as to whether the principles contained in *Keogh* could ever apply to situations involving State regulatory commissions. In Respondents' Brief and Appendix submitted to the State of Minnesota Court of Appeals in the companion case, *H. J. Inc. v. Northwestern Bell Corporation*, File No. CX-87-1843, p. 23, Respondents cite *Keogh v. Chicago & Northwestern Ry. Co.*, 260 U.S. 156 (1922) and *Square D Co. v. Niagra Frontier Tariff Bureau*, 476 U.S. 409 (1986) not to "argue that they bind this Court, but only to demonstrate that other courts have rejected Appellants' argument that regulatory rate decisions are not entitled to finality. . . ." The constitutional issues contained in a Federal court's unwillingness to examine the decisions of a commission operating under one of the other branches of the Federal Govern-

ment simply are not present in the instant case. Furthermore, Petitioners are not asking this Court to reopen the rates and examine the evidence—Petitioners are alleging that the commission itself was bribed—therefore rendering any decision from that commission a nullity. It is no different than if a decision of a trial court were tainted by bribery. Under Respondents' arguments, Petitioners could not collaterally attack that trial court's decision when the bribery was ultimately discovered. Such a result would be outrageous.

Finally, Respondents allege that the district court found that Petitioners' claim under 18 U.S.C. § 1962(a) was fatally defective because of the identity of "person" and "enterprise". Response Brief, p. 21. This is but one of the numerous RICO claims alleged by Petitioners; the other counts had no connection to 18 U.S.C. § 1962(a).

CONCLUSION

The third year anniversary of the *Sedima* decision is rapidly approaching. In *Sedima*, this Court noted that it is for Congress to limit the civil actions being brought under the RICO statute if it so chose. 473 U.S. 479 at 500. Congress has chosen to make no changes in the RICO statute. This Court also noted the courts had failed to "develop a meaningful concept of 'pattern'." *Id.* The courts are in disarray and in the three years since *Sedima* have still been unable to develop a meaningful concept of pattern. It is time for this Court to provide guidance. Petitioners therefore respectfully request that this Court provide guidelines in interpreting the RICO pattern requirement.

Dated: March 11, 1988.

Respectfully submitted,

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13

Supreme Court, U.S.
FILED
MAY 23 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1252

In The

Supreme Court of the United States

October Term, 1987

H.J. Inc., a Minnesota corporation, Kirk Dahl, Larry Krugen and Mary Krugen, individually and d/b/a Photo Images, Susan Davis, Robert Neal, Isaac H. Ward, Richard L. Anderson, Thomas J. Mott, and all others similarly situated,

Petitioners,

vs.

Northwestern Bell Telephone Company, a subsidiary of U.S. West, A.B.C. individually and D.E.F. as corporations, and other unnamed Co-conspirators,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOINT APPENDIX

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Certiorari Granted March 21, 1988

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APPENDIX A

RELEVANT DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
7-16-86	3	AMENDED COMPLAINT—issued amended summons.
8- 6-86	5	ANSWER OF DEFT. NORTHWESTERN BELL TELEPHONE COMPANY TO FIRST AMENDED COMPLAINT.
9-10-86	15	NOTICE AND MOTION OF DEFT. NORTHWESTERN BELL TELEPHONE COMPANY TO DISMISS PLTFS.' RICO CLAIMS, ret. 10-1-86 at 10:00 a.m.
10- 2-86	21	MINUTES OF PROCEEDINGS (HHM) (KJG) Re: Deft. Northwestern Bell's motion to dismiss Count I, to dismiss Pltf's. RICO claims, to dismiss or stay entire case, and for partial summary judgment—argued, submitted, taken under advisement. 2. Pltfs.' motion to strike defenses and to make answer more definite and certain—argued, submitted, taken under advisement.
11-24-86	29	JUDGMENT that 1. plaintiffs' motion to strike defenses is denied; 2. defendant's motion to dismiss Counts II-V of plaintiffs' amended complaint is granted; and 3. defendant's motion to dismiss Count I of plaintiffs' amended complaint is granted, and Count I is dismissed without prejudice.
12- 4-86	30	MOTION OF PLTFS. TO AMEND OR ALTER JUDGMENT, with affidavit of Susan Bedor.
2-18-87	31	MEMORANDUM AND ORDER (HHM) that plaintiffs' motion for reconsideration is in all respects denied. (CC:Attys).
3-12-87	32	NOTICE OF APPEAL OF PLTF. H.J. Inc., et al hereby appeals to the U.S.C.A. 8th Circuit from the judgment entered on November 26, 1986, dismissing Pltf. Complaint and from the Order entered on February 18, 1987 denying Plaintiffs' Motion to Reconsider its November 26, 1986 judgment.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

H.J., Inc. et al Appellants - Plaintiff vs. Northwestern Bell et al Appellees - Defendant	)	No. 4-86 Civ 546 Clerk's Notice under Rule 77(d) F. R. Civil Procedure (Filed Nov. 16, 1987)

You are hereby notified that in the above-entitled cause, on the 12 day of Nov., 1987

We filed,

CERTIFIED COPY OF MANDATE FROM THE UNITED STATES COURT OF APPEALS, EIGHTH CIRCUIT

CERTIFIED COPY OF JUDGMENT THAT: After consideration, it is ordered and adjudged that the judgment of the district court in this cause be affirmed in accordance with the opinion of this Court.

FRANCIS E. DOSAL, CLERK

By: SJP
Deputy Clerk

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APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 87-5121MN

H. J. Inc., etc., et al, Appellants, vs. Northwestern Bell Telephone Company, etc., et al, Appellees.	)	Appeal from the United States District Court for the District of Minnesota.

Appellants' petition for rehearing en banc has been considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

October 23, 1987

Order entered at the Direction of the Court:

/s/ Robert D. St. Vrain
Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 87-5121

H. J. Inc., a Minnesota corporation, Kirk Dahl, Larry Krugen and Mary Krugen, individually and d/b/a Photo Images, Susan Davis, Robert Neal, Issac H. Ward, Richard L. Anderson, Thomas J. Mott, and all others similarly situated, Appellants, v. Northwestern Bell Telephone Company, a subsidiary of U. S. West, A.B.C. individually and D.E.F. as corporations, and other unnamed coconspirators, Appellees.	)	Appeal from the United States District Court for the District of Minnesota.

Submitted: September 2, 1987

Filed: September 22, 1987

Before McMILLIAN, Circuit Judge, HENLEY, Senior Circuit Judge, and JOHN R. GIBSON, Circuit Judge.

HENLEY, Senior Circuit Judge.

Plaintiffs appeal from the district court's [1] order dismissing their complaint for failure to state a claim upon which relief could be granted. Fed. R. Civ. P. 12(b)(6); *H. J. Inc. v. Northwestern Bell Telephone Co.*, 648 F. Supp. 419, 430 (D. Minn. 1986). Appellants' complaint alleged, *inter alia*, violations of the Racketeer Influenced and Corrupt Organizations Act. 18 U.S.C. §§ 1961-68 (RICO). We affirm.

Because appellants' complaint was dismissed pursuant to Rule 12(b)(6), we view the facts alleged in their complaint in the light most favorable to them. *Bennett v. Berg*, 685 F.2d 1053, 1057-58 (8th Cir. 1982), *cert. denied*, 464 U.S. 1008 (1983). The gravamen of appellants' complaint is that appellee Northwestern Bell Telephone Company undertook to illegally influence members of the Minnesota Public Utilities Commission (MPUC), the state regulatory body responsible for determining the rates which Northwestern Bell may charge. Appellants claim that Northwestern Bell sought to influence individual MPUC commissioners by various methods including cash gifts, employment offers, tickets to sporting and cultural events, airline tickets, meals and parties. Appellants allege a series of episodes beginning in 1980 and claim the practices continue through the present. The district court dismissed appellants' RICO claims for failure to allege a pattern of racketeering activity. *H. J. Inc.*, 648 F. Supp. at 423-26.

---

[1]The Honorable Harry H. MacLaughlin, United States District Judge, District of Minnesota.

The core requirement for a RICO violation is a pattern of racketeering activity. 18 U.S.C. § 1962. *See Sedima, S.P.R.L. v. Imrex Co.*, 105 S.Ct. 3275, 3287 (1985). At the minimum, at least two acts of racketeering activity[2] are required to establish a pattern. *Sedima*, 105 S.Ct. at 3285 n.14. However, "while two acts are necessary, they may not be sufficient. Indeed, in common parlance two of anything do not generally form a 'pattern.'" *Id.* Prior to *Sedima* the pattern requirement could bet met by simply pleading two acts of racketeering activity. *See Superior Oil Co. v. Fulmer*, 785 F.2d 252, 255-56 (8th Cir. 1986). In *Sedima* the Supreme Court chastised Congress and the courts for failing to develop a workable definition of "pattern" which would limit the abuse of civil RICO. *Sedima*, 105 S.Ct. at 3287. Accordingly, this circuit has undertaken more meaningfully to construe the concept of "pattern."

We have followed the *Sedima* Court's intimations and have required the combination of continuity plus relationship to establish the necessary pattern. *Superior Oil*, 785 F.2d at 257. *See Holmberg v. Marrisette*, 800 F.2d 205, 209-10 (8th Cir. 1986), *cert. denied*, 107 S.Ct. 1953 (1987). "The term 'pattern' itself requires the showing of a relationship. . . . So, therefore, proof of two acts of racketeering activity, without more, does not establish a pattern. . . ." 116 Cong. Rec. 18940 (1970) (statement of Sen. McClellan), *quoted in Sedima*, 105 S.Ct. at 3285 n.14. The relationship prong is met when two or more racketeering acts are shown to be in pursuit of the same

---

[2]"Racketeering activity" has been defined to include a broad range of criminal offenses. 18 U.S.C. § 1961(1).

overarching scheme. *See Holmberg,* 800 F.2d at 210; *Superior Oil,* 785 F.2d at 257. The district court found that appellants' complaint satisfied the relationship prong. *H. J. Inc.*, 648 F. Supp. at 425. We agree.

The burden of establishing the continuity prong has proven more onerous. "The target of [RICO] is . . . not sporadic activity. The infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective. It is this factor of continuity plus relationship which combines to produce a pattern." S. Rep. No. 91-617, p. 158 (1969), *quoted in Sedima,* 105 S.Ct. 3285 n.14. In order to demonstrate the necessary continuity appellants must allege that Northwestern Bell "had engaged in similar endeavors in the past or that [it was] engaged in other criminal activities." *Deviries v. Prudential-Bache Securities, Inc.*, 805 F.2d 326, 329 (8th Cir. 1986). A single fraudulent effort or scheme is insufficient. *Id. See also Ornest v. Delaware North Cos.*, 818 F.2d 651, 652 (8th Cir. 1987) (single scheme over eight years to defraud plaintiffs of sales commissions); *Madden v. Gluck,* 815 F.2d 1163, 1164 (8th Cir. 1987) (defendant engaged in a vast array of fraudulent activities in pursuit of a single goal to keep a company afloat in order to loot it). Appellants' complaint alleges no more than a series of fraudulent acts "committed in furtherance of a single scheme to influence MPUC commissioners. . . ." *H. J. Inc.*, 648 F. Supp. at 425.

The district court did not err in finding that appellants' complaint failed to satisfy the continuity prong as

articulated in this circuit.[3] Therefore, because dismissal was appropriate under Rule 12(b)(6), we do not address the other issues raised in this appeal. The decision of the district court is affirmed.[4]

McMILLIAN, Circuit Judge, concurring.

I fully concur in the decision to affirm the district court's dismissal of the complaint for failure to satisfy the continuity prong of the pattern of racketeering activity test adopted by this circuit. I write separately only to state that I agree with Judge John R. Gibson that we should reconsider our pattern of racketeering activity test, in light of the contrary positions recently taken by several other circuits.

JOHN R. GIBSON, Circuit Judge, concurring.

I concur in the court's opinion because I am satisfied that this result is compelled by our earlier cases commencing with *Superior Oil Co. v. Fulmer,* 785 F.2d 252 (8th Cir. 1986). In *Henning v. First Bank of Worthington,* No. 86-5320 (8th Cir. July 7, 1987), I concurred separately and expressed my view that the multiple scheme requirement that we have grafted onto the pattern element strays from the statutory language of RICO. The Second and Sev-

---

[3]We are aware that our continuity plus relationship approach to the pattern requirement is not without criticism. *See Sun Savings & Loan Association v. Dierdorff,* No. 86-5811, 56 U.S.L.W. 2110 (9th Cir. Aug. 7, 1987); *United States v. Ianniello,* 808 F.2d 184, 192 (2d Cir. 1986).

[4]Appellants also alleged in their complaint pendent state law claims which were dismissed by the district court when the basis for pendent jurisdiction (the RICO claim) was dismissed. At oral argument the court was advised that state court proceedings had been or were to be initiated. We, of course, do not reach any such claims in this opinion.

enth Circuits, and now the Ninth Circuit, as well as numerous district courts and a respected scholar in this field, have criticized our position.[1]

I believe, as stated in my separate concurrence in *Henning*, that when a proper case arises the multiple scheme requirement should be examined by the court en banc.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

[1]*See Henning, supra*, footnote 5, and *Sun Savings & Loan Assn. v. Dierdorff*, No. 86-5811, 56 U.S.L.W. 2110 (9th Cir. Aug. 7, 1987).

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

H.J. Inc., a Minnesota corporation, Kirk Dahl, Larry Krugen and Mary Krugen, individually and d/b/a Photo Images, Susan Davis, Robert Neal, Isaac H. Ward, Richard L. Anderson, Thomas J. Mott, and all others similarly situated,

Plaintiffs,

v.

Northwestern Bell Telephone Company, a subsidiary of U.S. West, A.B.C. individually and D.E.F. as corporations, and other unnamed Co-conspirators,

Defendants.

CIVIL 4-86-546

MEMORANDUM AND ORDER

(Filed Feb. 18, 1987)

Mark Reinhardt, Susan Bedor, Reinhardt & Anderson, 1014 Conwed Tower, 444 Cedar Street, St. Paul, MN 55101, and John Cochrane, Cochrane & Bresnahan, 24 East Fourth Street, St. Paul, MN 55101, for plaintiffs.

John D. French, John F. Beukema, James L. Volling, Joseph H. Otterstetter, Faegre & Benson, 2300 Multifoods Tower, 33 South Sixth Street, Minneapolis, MN 55402, and Stephen T. Refsell, General Attorney, Northwestern Bell Telephone Company, Room 1800, 200 South Fifth Street, Minneapolis, MN 55402, for defendants.

This matter is before the Court on plaintiffs' motion to reconsider. Plaintiffs' motion will be denied.

FACTS

This is a class action arising under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-1968. Plaintiffs also bring a state law claim pursuant to the Court's pendent jurisdiction, alleging acts of bribery in contravention of Minn. Stat. § 609.42, subd. 1(1) and (2) and the common law of bribery. By order dated November 21, 1986, the Court granted defendant Northwestern Bell Telephone Co.'s (Northwestern Bell) motion to dismiss the complaint in its entirety. The facts of the case are set forth in the Court's prior order and will not be extensively reprised here. In brief, plaintiffs allege that Northwestern Bell, by and through its corporate agents, initiated a scheme designed to illegally influence various members of the Minnesota Public Utilities Commission (MPUC), the regulatory body which sets rates which Northwesten Bell may charge for the goods and services it provides. Plaintiffs allege that from early 1980 and through the present Northwestern Bell has offered benefits, rewards and consideration to certain MPUC commissioners, including bribes, offers of employment and various gifts, free meals, and emoluments, with intent to influence these commissioners in the performance of their duties. In its November 21 memorandum and order, the Court found that plaintiffs had failed to allege a "pattern" of racketeering within the meaning of the RICO statute, and accordingly granted defendant's motion to dismiss the RICO counts of plaintiffs' amended complaint. The Court dismissed plaintiffs' pendent state law claim without prej-

udice. Plaintiffs now bring this motion for reconsideration.

DISCUSSION

A. Pattern of Racketeering

It is by now well established that in order to establish a civil RICO cause of action plaintiffs must prove the existence of four elements: (1) conduct, (2) of an enterprise, (3) through a pattern, (4) of racketeering activity. *See Sedima, S.P.R.L. v. Imrex Co.*, 105 S.Ct. 3275, 3285 (1985) (footnote omitted); *Simon v. Fribourg*, CIVIL 4-86-259, slip op. at 9 (D.Minn. Aug. 20, 1986). The RICO act defines "pattern of racketeering injury" in the following terms:

> "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity.

18 U.S.C. § 1961(5). In *Sedima* the Supreme Court pointed out that while at least two acts of racketeering are necessary to form a pattern, two acts may not be sufficient. *Sedima*, 105 S.Ct. at 3285 n.14. Rather, it is the factor of continuity plus relationship which combines to produce a pattern. *Sedima*, 105 S.Ct. at 3285 n.14, *citing* S.Rep.No. 91-617, p. 158 (1969). In passing, the *Sedima* majority noted that the failure of Congress or the courts to develop a meaningful concept of "pattern" has contributed to the expansive potential of RICO's application, and suggested that a stricter interpretation of the pattern requirement

might be the key to arresting civil RICO's explosive growth. *Sedima*, 105 S.Ct. at 3287. Subsequently, the lower courts have accepted the Supreme Court's invitation to flesh out the pattern element, albeit with varying results. *See, e.g., Frankart Distributors, Inc. v. RMR Advertising, Inc.*, 632 F.Supp. 1198, 1200 (S.D.N.Y. 1986) (numerous courts have struggled with establishing a definition of pattern of racketeering activity in light of the *Sedima* Court's reasoning and the clear objectives of the RICO statute); *Smoky Greenhaw Cotton Co. v. Merrill Lynch, Pierce, Fenner and Smith, Inc.*, 785 F.2d 1274, 1280 n.7 (5th Cir. 1986) (Fifth Circuit directed its lower courts to consider more rigorous interpretation of the pattern requirement).

In the language of one of the more trusted sources for the definition of English words, a "pattern" is defined as: "an arrangement or composition that suggests or reveals a design; a configuration. . . ." WEBSTER'S NEW COLLEGIATE DICTIONARY (C & G Merriam Co. 1961), *cited in United States v. Freshie Co.*, 639 F. Supp. 442, 444 (E.D.Pa. 1986). The Omnibus Crime Control Act of 1970 provides that "criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristcs and are not isolated events." 18 U.S.C. § 3575(e), *cited in Sedima*, 105 S.Ct. at 3285 n.14. The courts have suggested that to compose a pattern "the acts complained of must be related to and similar in purpose, and must be part of an ongoing series of acts, rather than separate incidents in a series of sporadic

activities." *Louisiana Power and Light Co. v. United Gas Pipe Line Co.*, 642 F.Supp. 781, 808 (E.D.La. 1986), *citing Superior Oil Co. v. Fulmer*, 785 F.2d 252, 257 (8th Cir. 1986). In their search for a meaningful interpretation of "pattern" the courts have focused on the dual requirements of "relationship" and "continuity" highlighted by the *Sedima* majority.

1. Relationship

Relationship generally has proved the less problematic of the prongs enunciated by *Sedima*. It has been stated that to be related, the predicate acts of a RICO claim must involve common perpetrators, common methods of commission, common victims, and a common motive or purpose. *Medallion TV Enterprises, Inc. v. SelecTV of California, Inc.*, 627 F.Supp. 1290, 1296 (C.D.Cal. 1986); *Graham v. Slaughter*, 624 F.Supp. 222, 225 (N.D.Ill. 1985); *Allington v. Carpenter*, 619 F.Supp. 474, 478 (C.D.Cal. 1985). Relationship requires that the acts of racketeering be related to the operation of the enterprise, that is, sufficiently related to the statutorily proscribed conduct. *Papai v. Cremosnik*, 635 F.Supp. 1402, 1407-08 (N.D.Ill. 1986); *Technology Exchange Corp. of America, Inc. v. Grant County State Bank*, 646 F.Supp. 179, 183 (D.Colo. 1986). As stated by the United States Court of Appeals for the Seventh Circuit in *Morgan v. Bank of Waukegan*, 804 F.2d 970, 975 (7th Cir. 1986), "[r]elationship implies that the predicate acts were committed somewhat closely in time to one another, involve the same victim, or involve the same type of misconduct." *Morgan*, 804 F.2d at 975.

In this case, it is clear that plaintiffs have alleged a "relationship" among and between the predicate acts of

racketeering enumerated in their amended complaint. Plaintiffs have identified common perpetrators, Northwestern Bell and certain of its officers and agents; common victims, Northwestern Bell's ratepayers; and a common motive or purpose, improper influence of MPUC commissioners through bribes, gifts and assorted emoluments. Plaintiffs have alleged that the acts of racketeering are related to the operation of the enterprise, and that each of these acts was directed toward a similar end. In this case, as in most reported RICO decisions, plaintiffs have little difficulty surmounting the "relationship" barrier.

2. Continuity

As the Court noted in its November 21 order, continuity presents a more problematic analysis, both on the facts of this case and in general. At a minimum, continuity means that plaintiffs must allege "more than sporadic or isolated activity." *Graham*, 624 F.Supp. at 225. The term pattern "connotes a multiplicity of events: . . . The continuity inherent in the term presumes repeated criminal activity, not merely repeated acts to carry out the same criminal activity." *Northern Trust Bank/O'Hare, N.A. v. Inryco, Inc.*, 615 F.Supp. 828, 831 (N.D.Ill. 1985). In this respect, ongoing criminal activity or at least a threat of ongoing criminal activity is a key indicium of continuity. *Ghouth v. Conticommodity Services, Inc.*, 642 F.Supp. 1325, 1337 (N.D.Ill. 1986). One court has stated that in determining whether continuity exists, courts should look to "the purposes, results, participants, victims and methods of commission." *Technology Exchange*, 646 F. Supp. at 183-84. Quite obviously, these are identical to the factors to be assessed in gauging "relatedness." The

"inherent contradiction" which exists between the dual requirements of relatedness and continuity is perhaps resolved by recognizing that relatedness requires proof that the predicate acts are "sufficiently connected," while, in contrast, continuity requires proof that the predicate acts are "sufficiently differentiated." *Freshie*, 639 F.Supp. at 445; *Allington*, 619 F.Supp. at 478. To prove relatedness, plaintiffs must demonstrate that the predicate acts evince common perpetrators, victims, methods, motive or purpose. To prove continuity, plaintiffs must demonstrate that the racketeering acts are "sufficiently unconnected in time or substance to warrant consideration as separate criminal episodes." *Allington*, 619 F.Supp. at 478. As stated in *Freshie*:

> [A]n inherent tension exists between the dual requirements of relatedness and continuity. Viewed on a continuum, these two requirements must reach some equitable balance to form a "pattern." . . . [T]he acts must be "sufficiently connected, but also sufficiently differentiated." . . . [A]s the acts become more related, the same transactions lose some of their separateness. On the other hand, if a series of predicate acts satisfied the requirement of "separate criminal episodes," then those acts might well not meet the relatedness requirement, being too disjointed (different subject matter) and too remote (in time).

Freshie, 639 F.Supp. at 445 (citations omitted).

The United States Court of Appeals for the Eighth Circuit has had an opportunity to address the continuity requirement in four post-*Sedima* decisions. In *Alexander Grant and Co. v. Tiffany Industries, Inc.*, 770 F.2d 717 (8th Cir. 1985), *cert. denied*, 106 S.Ct. 799 (1986), the Court stated in dictum that plaintiff's allegations of

twenty-six acts of mail fraud and four acts of wire fraud were sufficient to demonstrate a pattern of racketeering activity. The Court declared:

> The number and nature of acts, together with allegations demonstrating their similar purposes, results, participants, victims, and methods of commission, bespeak a sufficient "continuity plus relationship" to satisfy the Supreme Court's concerns in *Sedima* that RICO not be extended to reach sporadic activity.

Alexander Grant, 770 F.2d at 718 n.1.

In *Superior Oil Co. v. Fulmer*, 785 F.2d 252 (8th Cir. 1986) the court found that plaintiff's allegations of several related acts of mail and wire fraud in furtherance of a scheme to convert gas from plaintiff's pipeline did not rise to the level of a "pattern" of racketeering activity. The Court declared that proof of a single fraudulent scheme, implemented by several fraudulent acts, does not bespeak "continuity" in the absence of proof that the defendants "had ever done these activities in the past . . . [or] that they were engaged in other criminal activities elsewhere," *Superior Oil*, 785 F.2d at 257. The court concluded:

> The actions of [defendants] comprised one continuing scheme to convert gas from [plaintiff's] pipeline. . . . On the facts of this case, we agree with the court's conclusion in *Northern Trust Bank/O'Hare, N.A. v. Inryco, Inc.*, 615 F.Supp. 828, 832 (D.C.Ill. 1985), that "[i]t is difficult to see how the threat of continuing activity stressed in the Senate Report could be established by a single criminal episode. * * * It places a real strain on the language to speak of a single fraudulent effort, implemented by several fraudulent acts, as a "pattern of racketeering activity."

Superior Oil, 785 F.2d at 257 (footnote omitted).

In *Holmberg v. Morrisette*, 800 F.2d 205 (8th Cir. 1986), plaintiff offered proof of several acts of wire or mail fraud related to a single scheme to draw letters of credit. The Eighth Circuit found that, because defendants' fraudulent acts were undertaken as part of a "common purpose or scheme," there was no showing of continuity, absent proof that the defendants "had engaged in like activities in the past or that they were engaged in other criminal activities." *Holmberg*, 800 F.2d at 210. In the absence of allegations of like wrongful activity in the past or other wrongful activity elsewhere, plaintiff's RICO claim was found to be fatally defective.

The most recent Eighth Circuit teaching on the subject is *Deviries v. Prudential-Bache Securities, Inc.*, 805 F.2d 326 (8th Cir. 1986). In *Deviries* plaintiff alleged that the defendant had made misrepresentations to secure his securities brokerage account and then "churned" the account over a six-year period. The Eighth Circuit found that each of the predicate acts alleged were committed in furtherance of a single "scheme," and that accordingly, plaintiff had "failed to allege the continuity necessary to establish a 'pattern' of racketeering activity." *Deviries*, 805 F.2d at 329. Following *Superior Oil* and *Holmberg*, the *Deviries* court found plaintiff's allegations of a "pattern" insufficient absent an "allegation that [defendants] had engaged in similar endeavors in the past or that they were engaged in other criminal activities." *Deviries*, 805 F.2d at 329.

As a number of courts and commentators have noted, the Eighth Circuit's approach to the pattern requirement lies at one end of the spectrum of post-*Sedima* RICO

"pattern" jurisprudence. What is require to allege a pattern of racketeering activity in the Eighth Circuit is proof of multiple criminal schemes or episodes, that is, that defendants have engaged in similar criminal activities in the past or are engaged in other criminal activities elsewhere. Critics of this approach point out that it appears to run contrary to the *Sedima* court's directive that "RICO is to 'be liberally construed to effectuate its remedial purposes,' " *Sedima*, 105 S.Ct. at 3286, *quoting* Pub.L. 91-452, § 904(a), 84 Stat. 947, and that "the imposition of a 'multi-scheme' requirement . . . could arbitrarily exclude large-scale frauds from [RICO's] scope simply because the actors' overall goal—while perhaps no less ambitious or ultimately harmful than a series of short-range illegal plots—happens to be a monolithic one." *McLendon v. the Continental Group, Inc.*, No. 83-1340, slip op. at 8 (D.N.J. July 31, 1986); *Morgan*, 804 F.2d at 975. Advocates of the Eighth Circuit's restrictive approach contend that "[t]his construction of the pattern requirement is the only construction that effectuates Congress' intent to avoid imposition of RICO liability where there have been only isolated or sporadic criminal acts." *Frankart*, 632 F.Supp. at 1201. *See, e.g., Simon*, slip op. at 9 (no pattern where plaintiff does not allege that defendants concocted a similar scheme in any other year or that they were otherwise involved in any criminal activity); *Kredietbank, N.V. v. Joyce Morris, Inc.*, CIVIL No. 84-1903 slip op. (D.N.J. Oct. 11, 1985) (a series of fraudulent mailings did not constitute a pattern of racketeering activity where mailings were all aimed at implementing a single fraudulent scheme); *Medical Emergency Service Association S.C. v. Foulke*, CIVIL 85-4064, slip op. (N.D.Ill. Jan. 7, 1986)

(multiple mailings in furtherance of a single criminal episode are insufficient to establish a pattern of racketeering activity); *Dunham v. Independence Bank of Chicago*, 629 F.Supp. 983 (N.D.Ill. 1986) (no pattern where each of the predicate acts occurred in the execution of a single, though repeated, substantive misrepresentation); *Professional Assets Management, Inc. v. Penn Square Bank, N.A.*, 616 F.Supp. 1418 (W.D.Okla. 1985) (no pattern where claim arises from one engagement to perform one bank audit); *Teleprompter of Erie, Inc. v. City of Erie*, 537 F.Supp. 6 (W.D.Pa. 1981) (multiple bribes received by councilman at a political fundraiser did not constitute a pattern); *Rich Maid Kitchens, Inc. v. Pennsylvania Lumbermens Mutual Insurance Co.*, 641 F.Supp. 297 (E.D.Pa. 1986) (one isolated fraudulent scheme, even if containing more than one fraudulent act, is not enough to constitute a pattern); *Richardson Greenshields of Canada Ltd. v. Patel*, 643 F.Supp. 672 (S.D.N.Y. 1986) (no pattern where predicate acts were part of a single, unified activity); *Exeter Towers Associates v. Bowditch*, 604 F.Supp. 1547 (D.Mass. 1985) (two acts of mail fraud in connection with the purchase of a single mortgage does not constitute a pattern).

At the other extreme are those cases, most notably the decision of the United States Court of Appeals for the Fifth Circuit in *R.A.G.S. Couture, Inc. v. Hyatt*, 774 F.2d 1350 (5th Cir. 1985), holding that a showing of two related predicate acts is sufficient. *See also Trak Microcomputer Corp. v. Wearne Bros.*, 628 F.Supp. 1089 (N.D. Ill. 1985); *Conan Properties, Inc. v. Mattel, Inc.*, 619 F. Supp. 1167 (S.D.N.Y. 1985); *Systems Research, Inc. v.*

Random, Inc., 614 F.Supp. 494 (N.D.Ill. 1985). Critics of this approach point out that it will invariably "sweep into federal courts, under RICO, the great majority of actions for fraud in commercial transactions." *Exeter*, 604 F. Supp. at 1554.[1]

A number of courts, most notably the United States Court of Appeals for the Eleventh Circuit in *Bank of America National Trust & Savings Association v. Touche Ross & Co.*, 782 F.2d 966 (11th Cir. 1986), have attempted to steer a middle ground, holding that a single fraudulent scheme which encompasses various predicate acts over a significant period of time satisfies the pattern requirement. *See Freshie*, 639 F.Supp. at 444. Under this approach, it is not necessary to allege multiple criminal schemes, provided that plaintiff alleges an "open-ended scheme" over an extended period of time evincing criminal activity which is continuous in nature rather than isolated. *B.J. Skin & Nail Care, Inc. v. International Cosmetic Exchange, Inc.*, 641 F.Supp. 563, 566 (D.Conn. 1986). In *Morgan v. Bank of Waukegan*, 804 F.2d 970 (7th Cir. 1986), the Seventh Circuit appeared to adopt this intermediate approach, holding that "[i]n order to be sufficiently continuous to constitute a pattern of racketeering activity, the predicate acts must be ongoing over an identified period of time so that they can fairly be viewed as constituting separate transactions, *i.e.*, 'transactions

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[1] The *R.A.G.S.* opinion is unpersuasive for another reason. In the subsequently decided *Smoky Greenhaw* opinion the Fifth Circuit seemed to suggest that the nature of the pattern requirement remained an open question, without reference to *R.A.G.S. See Smoky Greenhaw*, 785 F.2d at 1280 n.7.

somewhat separated in time and place.' . . . ." *Morgan*, 804 F.2d at 975. Advocates of the intermediate approach, dubbed the "multiple episodes plus ongoing course of conduct" standard, *Gidwitz v. Stirco, Inc.*, 646 F.Supp. 825, 829 (N.D.Ill. 1986), contend that it deflects "garden variety" commercial fraud cases while sweeping into the RICO net those cases which are large in scale albeit monolithic. *See, e.g., Temporaries, Inc. v. Maryland National Bank*, 638 F.Supp. 118 (D.Md. 1986); *Louisiana Power*, 642 F.Supp. at 808; *Freshie*, 639 F.Supp. at 445.

Plaintiffs urge the Court to adopt the intermediate approach above-referenced and to find that because the amended complaint includes allegations of various predicate acts committed over an extended, identifiable period of time, the continuity aspect of the pattern requirement is met, notwithstanding that these predicate acts transpired in connection with a single "scheme." As stated by the Court in its prior order, were the Court writing on a clean slate these arguments might well be persuasive. The Eighth Circuit has thrice held, however, that continuity requires proof of multiple criminal episodes. *Superior Oil*, 785 F.2d at 257; *Holmberg*, 800 F.2d at 210; *Deviries*, 805 F.2d at 329. This unbroken line of authority the Court is not free to disregard. Here, plaintiffs' amended complaint includes no allegations of separate transactions—merely separate predicate acts—and no allegations that these predicate acts have independent harmful significance. Each of the predicate acts alleged by plaintiffs was committed in furtherance of a single scheme to influence MPUC commissioners to the detriment of Northwestern Bell's ratepayers. The Court is obliged to turn to the

language of *Superior Oil, Holmberg,* and *Deviries*: plaintiffs simply have not alleged that defendants have engaged in like activities in the past or that they are engaged in other criminal activities elsewhere.

The approach adopted by the Eighth Circuit is designed to give meaning to Congress' intended rejection of RICO liability predicated upon isolated or sporadic criminal acts. *Allington,* 619 F.Supp at 478, *citing* 116 Cong.Rec. 35193 (statement of Rep. Poff) (RICO not aimed at the isolated offender). Moreover, the requirement that plaintiffs in a civil RICO action demonstrate that the predicate acts occurred in different criminal episodes is consistent with the connotation of multiple events implicit in the term pattern. *Medallion TV,* 627 F.Supp. at 1296. A "pattern" requires more than one single criminal episode carved into distinct predicate acts. *Commercial Agropequaria Menichetti Fuente S.A.C.I. v. Heather Trading Corp.*, 85 CIVIL 3240, slip op. at 8 (S.D.N.Y. Mar. 27, 1986), *cited at Richardson,* 643 F.Supp. at 674.[2] Although plaintiffs have alleged numerous predicate acts over an extended period of time, it is clear that these acts were part and parcel of a unified, monolithic criminal scheme. The predicate acts alleged by plaintiffs are not "sufficiently unconnected in time and substance to warrant consideration as separate criminal episodes." *Medallion TV,* 627 F.Supp. at 1297.

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[2] As stated by Justice Powell in his *Sedima* dissent, "[t]he definition of pattern may . . . logically be interpreted as meaning that the presence of the predicate acts is only the beginning: something more is required for a 'pattern' to be proved." *Sedima,* 105 S.Ct. at 3289 (Powell, J. dissenting).

Plaintiffs urge the Court to depart from the multiple criminal schemes test adopted by the Eighth Circuit and to focus instead on factors such as the duration of the alleged racketeering activity and the number of victims. A number of courts and commentators have noted that an interpretation of "pattern" which turns on fine distinctions between single or multiple "episodes" or "schemes" is ill-suited to accomplishment of RICO's central purpose, the eradication of "traditional mobster and racketeer activity and comparable ongoing structured criminal enterprises." ABA Ad Hoc Civil Task Force 71, *quoted in Sedima,* 105 S.Ct. at 3289 (Powell, J., dissenting). These courts have focused analysis on several relevant factors, including:

(1) *Duration*—One indicium of "continuity" is the duration of the alleged criminal activity. To the extent plaintiff alleges criminal activity which is ongoing over an identified period of time, the possibilities are enhanced that defendants are indeed engaged in traditional mobster activity or comparable ongoing structured criminal enterprises. Conversely, where the predicate acts are of a finite and limited duration, directed at a specific goal, the likelihood increases that ordinary commercial fraud is involved.

(2) *Threat of Ongoing Criminal Activity*—Hand-in-hand with duration, which focuses on past events, is the threat of ongoing criminal activity, which focuses on the likelihood that defendant's criminal activities will continue into the future. Absent allegations that defendants' scheme has the potential to continue indefinitely a strong likelihood exists that the wrongs alleged are isolated, not systematic.

(3) *Multiple Victims*—One characteristic of traditional mobster activity or comparable ongoing structured criminal enterprises is the presence of many victims. "The repetition of an act taken against a single victim . . . suggests no expansion, no ongoing design, no continuity, such as was the target of Congress" in enacting RICO. *Satellite Financial Planning Corp. v. First National Bank of Wilmington,* 646 F.Supp. 118, 120 (D.Del. 1986); *Kriedtbank,* slip op. at 9.

(4) *Independent Harmful Significance*—Some courts have looked to the independent harmful significance of the predicate acts alleged by plaintiffs as an indicium of continuity. A predicate act has independent harmful significance if, standing alone, it brings about the injury complained of. A predicate act lacks independent harmful significance if it brings about injury only in conjunction with other predicate acts.

(5) *Methods of Commission*—One factor frequently cited by the courts is the methods of commission employed by the defendants. This factor is perhaps less useful than the others, in that it is well-accepted that the mere fact that defendants have employed more than one fraudulent method does not establish a pattern.

(6) *Regular Part of Defendants' Business*—One court has suggested that "RICO's purposes are best served by also requiring that . . . a reasonable inference can be made that these episodes were not an aberration in the way a defendant conducted his business. Rather, the pattern made up of multiple episodes must be a regular part of the way a defendant does business and in that sense, ongoing." *Papai,* 635 F.Supp. at 1412.

The above-referenced factors have been highlighted by some courts as having relevance to the pattern inquiry. The courts have noted that these factors are not exhaustive and that all factors need not be proven in each case. The pattern question must inevitably be decided on a case-by-case basis. *Ghouth,* 642 F.Supp. at 1337. The intent of this analysis is to "flesh out the identifying characteristics of the [term] 'episode,' using the concept of 'continuity' as a guidepost." *Ghouth,* 642 F.Supp. at 1339.

Even assuming that these factors have relevance, the Court would still be constrained to find that plaintiffs have not alleged a pattern of racketeering activity. Plaintiffs have alleged criminal activity of long duration. Whether plaintiffs have alleged the threat of continuing criminal activity is a closer question, particularly in view of the review by the MPUC of its past actions. Plaintiffs have alleged the presence of multiple victims, assuming that the body of Northwestern Bell ratepayers is not one corporate victim, but has not shown independent harmful significance, since it is the aggregate of predicate acts which produced their injuries. Plaintiffs have alleged various methods of commission. It cannot be said, however, that the alleged "pattern" of predicate acts is a "regular part of the way" defendants conduct their business. On balance, the Court finds that, applying the enumerated factors, plaintiffs' allegations do not fit the RICO paradigm. Of course, in the Eighth Circuit the governing standard is the multiple criminal episodes test of *Superior Oil, Holmberg,* and *Deviries.* Applying this test, the Court finds that plaintiffs have not alleged a pattern of racketeering activity. Accordingly, plaintiffs' motion for reconsideration of the Court's RICO ruling is denied.

3. *Enterprise—Person*

Plaintiffs' Count II arises under RICO, 18 U.S.C. § 1962(a). For purposes of their section 1962(a) claim, plaintiffs allege that Northwestern Bell is both a "person" within the meaning of 18 U.S.C. § 1961(3) and an "enterprise" within the meaning of 18 U.S.C. § 1961(4). In its November 21 order the Court noted that the Eighth Circuit has ruled that for purposes of a claim arising under section 1962(c) the RICO enterprise must be distinct from the RICO person. *See Bennett v. Berg*, 685 F.2d 1053 (8th Cir. 1982), *on rehearing*, 710 F.2d 1361 (8th Cir.), *cert. denied*, 104 S.Ct. 527 (1983). With this in view, the Court stated that in a section 1962(a) action as in a section 1962(c) action plaintiffs must allege and prove a RICO "enterprise" separate and distinct from the RICO "person."

A number of courts have found that the person and enterprise need not be distinct in a section 1962(a) action. *See, e.g., B.F. Hirsch, Inc. v. Enright Refining Co.*, 751 F.2d 628 (3d Cir. 1984); *Haroco, Inc. v. American National Bank and Trust Co. of Chicago*, 747 F.2d 384 (7th Cir. 1984); *Schreiber Distributing Co. v. Serv-Well Furniture Co.*, 55 U.S.L.W. 2364-65 (9th Cir. Dec. 24, 1986). Other courts have ruled that the distinction pertains in a section 1962(a) action. *United States v. Computer Sciences Corp.*, 689 F.2d 1181 (4th Cir. 1982); *Rush v. Oppenheimer & Co.*, 628 F.Supp. 1188, 1197 (S.D.N.Y. 1985). The Court continues to be of the view that the RICO person and enterprise must be distinct for purposes of a section 1962(a) claim. In addition to the reasons cited in the Court's November 21 order, the Court notes the following:

(1) In the absence of "very explicit statutory language," the courts are not inclined to accept the proposition that a civil RICO defendant could participate with itself in the illicit use or investment of income derived from a pattern of racketeering activity. *Computer Sciences Corp.*, 689 F.2d at 1183.

(2) Because civil RICO was intended to provide a remedy against the infiltrator of legitimate business, and not against the infiltrated enterprise, a separate enterprise-person requirement is appropriate in a 1962(a) action as in a 1962(c) action. *Rush*, 628 F.Supp. at 1197.

(3) Perhaps most significantly, the construction of section 1962(a) urged by plaintiffs would fly in the face of ongoing efforts by Congress and the courts to curtail the expansive reach of civil RICO.

For these reasons, plaintiffs' motion for reconsideration of the Court's 1962(a) statements is denied.

4. *Filed Rate Doctrine*

In its November 21 order the Court found that the federal "filed rate" doctrine precludes plaintiffs' cause of action. Plaintiffs urge the Court to reconsider its position. Plaintiffs have not, however, cited any new authority or arguments in support of its motion for reconsideration. Accordingly, plaintiffs' motion will be denied.

Based on the foregoing, and upon review of all files, records and proceedings herein,

IT IS ORDERED that plaintiffs' motion for reconsideration is in all respects denied.

/s/ Harry H. MacLaughlin
Judge Harry H. MacLaughlin
United States District Court

DATED: February 18, 1987

APPENDIX F

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

H.J. Inc., a Minnesota corporation, Kirk Dahl, Larry Krugen and Mary Krugen, individually and d/b/a Photo Images, Susan Davis, Robert Neal, Isaac H. Ward, Richard L. Anderson, Thomas J. Mott, and all others similarly situated,

Plaintiffs,

v.

Northwestern Bell Telephone Company, a subsidiary of U.S. West, A.B.C. individually and D.E.F. as corporations, and other unnamed Co-conspirators,

Defendants.

CIVIL 4-86-546

MEMORANDUM AND ORDER

(Filed Nov. 24, 1986)

Mark Reinhardt, Susan Bedor, Reinhardt & Anderson, 1014 Conwed Tower, 444 Cedar Street, St. Paul, MN 55101, and John Cochrane, Cochrane & Bresnahan, 24 East Fourth Street, St. Paul, MN 55101, for plaintiffs.

John D. French, John F. Beukema, James L. Volling, Joseph H. Otterstetter, Faegre & Benson, 2300 Multifoods Tower, 33 South Sixth Street, Minneapolis, MN 55402, and Stephen T. Refsell, General Attorney, Northwestern Bell Telephone Company, Room 1800, 200 South Fifth Street, Minneapolis, MN 55402, for defendants.

This matter is before the Court on defendant Northwestern Bell Telephone Company's motion to dismiss and/or for summary judgment, and on plaintiffs' motion to strike defenses. Plaintiffs' motion will be denied. Defendant's motion to dismiss will be granted.

FACTS

Plaintiff H.J., Inc. is a Minnesota corporation with its principal place of business in Burnsville, Minnesota. Plaintiffs Kirk Dahl, Mary Krugen, Larry Krugen, Susan Davis, Robert Neal, Isaac H. Ward, Richard L. Anderson, and Thomas J. Mott are each Minnesota residents. Each of the named plaintiffs has purchased telecommunications goods and services from Northwestern Bell. Defendant Northwestern Bell Telephone Co., a subsidiary of U.S. West, Inc., is a telecommunications concern supplying goods and services in interstate commerce. Defendants Harry Crump, Leo Adams, Barbara Beerhalter, Roger Hanson, and Juanita Satterlee are present or former members of the Minnesota Public Utilities Commission (MPUC). Defendant Robert Johnson is counsel for the Minnesota Telephone Association. Ray Larson, Roy Weir, Thomas Madison, and Gene Bier are officers and/or employees of Northwestern Bell.

This is a class action arising under the Racketter Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-1968. Plaintiffs allege that defendants committed acts in violation of 18 U.S.C. §§ 1962(a), (b), and (c) and further allege that defendants conspired to commit racketeering acts in violation of 18 U.S.C. § 1962(d). Plaintiffs also bring state law claims pursuant to the

Court's pendent jurisdiction, alleging acts of bribery in contravention of Minn. Stat. § 609.42, subd. 1(1) and (2) and the common law of bribery.

The gist of plaintiffs' cause of action is an allegation that Northwestern Bell, by and through its corporate agents, initiated a scheme designed to illegally influence various members of the MPUC, the regulatory body which sets rates which Northwestern Bell may charge for the goods and services which it provides. Plaintiffs allege that from July, 1980 and through the present, Northwestern Bell has offered, promised, or given, directly or indirectly, certain benefits, rewards, and consideration to duly appointed MPUC commissioners, with the intent to influence said commissioners with respect to the performance of their duties as officers of the MPUC. Amended Complaint ¶ 30. Specifically, plaintiffs allege the following corrupting acts:

(1) MPUC commissioner Hanson negotiated with Northwestern Bell officials including Gene Bier, Northwestern Bell's chief executive officer, regarding an offer of employment made to Hanson by Northwestern Bell in November, 1984, at a time when Hanson was still an MPUC commissioner. Amended Complaint ¶ 37.

(2) MPUC commissioner Hanson received illicit payments from Northwestern Bell of $30,000 during 1985. The illicit payments were made to Robert Johnson, counsel for the Minnesota Telephone Association, and passed on to Hanson. Amended Complaint ¶ 38. These illicit payments continued after Hanson was reappointed MPUC commissioner on November 25, 1985. Amended Complaint ¶ 39.

(3) Northwestern Bell executives Thomas Madison and Roy Weir made an offer of employment to MPUC Commissioner Juanita Satterlee while Satterlee was still a commission member. Amended Complaint ¶ 40.

(4) Northwestern Bell made illicit payments to Satterlee of $106,129 during the period 1983-1984, while Satterlee was an MPUC commissioner. Amended Complaint ¶ 41.

(5) Northwestern Bell officer Larson provided MPUC commissioner Crump with a free plane ride from Oklahoma to Minneapolis on June 26, 1985. Amended Complaint ¶ 31.

(6) MPUC commissioners Crump and Beerhalter were provided with an all-expenses-paid excursion to Canterbury Downs in September, 1985, courtesy of Northwestern Bell. Amended Complaint, ¶ 32, 36.

(7) MPUC commissioner Crump was provided with tickets to various Broadway plays by Northwestern Bell officials between 1984 and the present. Amended Complaint ¶ 33.

(8) MPUC commissioners Crump and Adams were provided with free tickets to various sporting events by Northwestern Bell officials during the period 1981 to the present. Amended Complaint ¶ 34, 35.

(9) During the period July, 1980 to the present, Northwestern Bell has expended thousands of dollars for various gifts, emoluments, meals, and parties for MPUC commissioners. Amended Complaint ¶ 42.

Plaintiffs' complaint is in five counts. Count I is a state law claim alleging that the defendants bribed MPUC

commissioners by offering to those commissioners benefits, rewards, and consideration to which they were not entitled. Plaintiffs seek civil recovery based on violation of the Minnesota criminal bribery statute, Minn. Stat. § 609.42, subd. 1(1) and (2), and for common law bribery. Count II is a RICO claim arising under section 1962(a). Count III arises under RICO section 1962(b), alleging that the defendants associated with the MPUC in unlawful racketeering activity. Count IV arises under RICO section 1962(c) and Count V is a conspiracy count arising under RICO section 1962(d). Each of the RICO counts involves an allegation that the defendants and the MPUC associated together for the purpose of unlawful racketeering activity.

Plaintiffs seek to recover compensatory damages, measured by the amount received by Northwestern Bell in excess of what would have been a fair and reasonable charge for telephone services. Plaintiffs also seek to recover punitive damages, treble damages pursuant to RICO, 18 U.S.C. § 1984(c), and an injunction prohibiting defendants from engaging in further unlawful activity.[1]

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[1] The Court was pleased to note that on November 7, 1986 the MPUC voted to reconsider a $57.5 million rate increase granted to Northwestern Bell in 1984. As the Court noted at oral argument, the Commission appears to be an appropriate place to consider whether the alleged briberies and other improper contacts had any effect upon the rate increases granted to Northwestern Bell by the MPUC. The MPUC's decision to reopen the case means that the rate differentiations of which plaintiffs complain could be corrected by an MPUC decision to abrogate the 1984 rate increases. Minneapolis Star & Tribune, November 8, 1986, at 1, col. 1.

Defendant Northwestern Bell now brings this motion to dismiss and/or for summary judgment. Plaintiffs have filed a counter-motion to strike defenses.

DISCUSSION

A. *Timeliness*

As a threshold matter, plaintiffs argue that defendant's Rule 12(b)(6) motion to dismiss is untimely. Defendant's motion was filed after defendant's answer to plaintiffs' amended complaint. Rule 12(b)(6) provides that a motion to dismiss for failure to state a claim upon which relief can be granted shall be made "*before* [responsive] pleading if a further pleading is permitted." Fed.R.Civ.P. 12(b)(6) (emphasis added). Rule 12 gives the defendant the option of raising a defense by motion or by the pleadings, however. Courts have discretion to allow 12(b)(6) motions if the defense has been previously included in the answer. 5 C.Wright, A.Miller & M.Kane, *Federal Practice and Procedure* § 1361 at 643 n.35. Here, defendant raised its defenses in its answer. In the exercise of the Court's discretion the defendant will be permitted to bring a Rule 12(b)(6) motion at this time.

B. *Motion to Strike Defenses*

Plaintiffs have brought a motion to strike defendants' third, fourth, fifth, sixth, seventh, ninth, tenth, eleventh, and twelfth defenses. Plaintiffs' motion is brought pursuant to Fed.R.Civ.P. 12(f) which provides:

> Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon him or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

Fed.R.Civ.P. 12(f). A Rule 12(f) motion to strike defenses is a drastic remedy which is disfavored by the courts and is infrequently granted. *Vernon J. Rockler & Co. v. Minneapolis Shareholders Co.*, 69 F.R.D. 1, 5 (D. Minn. 1975). A Rule 12(f) motion to strike will be granted only where the Court is convinced that there are no questions of fact, that any questions of law are clear and not in dispute, and that under no set of circumstances could the defenses succeed. *Carter-Wallace, Inc. v. Riverton Laboratories, Inc.*, 47 F.R.D. 366, 368 (S.D.N.Y. 1969).

Plaintiffs have failed to show that the "drastic remedy" of striking defendants' defenses is appropriate in the case at bar. Each of the challenged defenses is facially valid. Accordingly, plaintiffs' Rule 12(f) motion to strike defenses will be denied.

C. RICO

In order to establish a RICO cause of action plaintiffs must prove the existence of four elements:

(1) conduct

(2) of an enterprise

(3) through a pattern

(4) of racketeering activity.

See Sedima, S.P.R.L. v. Imrex Co., 105 S.Ct. 3275, 3285 (1985) (footnote omitted); *Simon v. Fribourg*, CIVIL

4-86-259, slip op. at 9 (D.Minn. Aug. 20, 1986). Defendant moves to dismiss plaintiffs' RICO claim on the ground that plaintiffs have failed to allege a "pattern" of racketeering activity.

1. *"Pattern" of Racketeering Activity*

An essential element of the RICO civil cause of action is proof that defendants have engaged in a "pattern" of racketeering activity. The "pattern" requirement was subjected to a searching analysis in the Supreme Court's *Sedima* decision. The *Sedima* Court enunciated the following guiding principles:

> (1) two isolated acts of racketeering activity do not constitute a pattern;
>
> (2) it is the factors of *continuity plus relationship* which combine to produce a pattern;
>
> (3) the "pattern" element of the statute was designed to limit RICO's application to planned, ongoing, continuing crime as opposed to sporadic, unrelated, isolated criminal episodes.

See Sedima, 105 S.Ct. at 3285 n.14.[2]

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[2] The *Sedima* Court made the following observations:

> As many commentators have pointed out, the definition of a "pattern of racketeering activity" differs from the other provisions in § 1961 in that it states that a pattern "*requires* at least two acts of racketeering activity," § 1961(5) (emphasis added), not that it "means" two such acts. The implication is that while two acts are necessary, they may not be sufficient. Indeed, in common parlance two of anything do not

(Continued on following page)

The United States Court of Appeals for the Eighth Circuit has explored the meaning of "pattern" in a civil RICO context in two recent cases, *Superior Oil Co. v. Fulmer*, 785 F.2d 252 (8th Cir. 1986) and *Holmberg v. Morrisette*, CIVIL Nos. 85-5138 and 85-5221 slip op. (8th Cir. Sept. 3, 1986). In *Superior Oil*, the plaintiff proved several related acts of mail and wire fraud in furtherance of a single crime—the conversion or theft of gas from plaintiff's pipeline. The Eighth Circuit found that plain-

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> generally form a "pattern." The legislative history supports the view that two isolated acts of racketeering activity do not constitute a pattern. As the Senate Report explained: "The target of [RICO] is thus not sporadic activity. The infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective. It is this factor of *continuity plus relationship* which combines to produce a pattern." S.Rep. No. 91-617, p 158 (1969) (emphasis added). Similarly, the sponsor of the Senate bill, after quoting this portion of the Report, pointed out to his colleagues that "[t]he term 'pattern' itself requires the showing of a relationship. . . . So, therefore, proof of two acts of racketeering activity, without more, does not establish a pattern. . . ." 116 Cong.Rec. 18940 (1970) (statement of Sen. McClellan). *See also id.*, at 35193 (statement of Rep. Poff) (RICO "not aimed at the isolated offender"); House Hearings, at 655. Significantly, in defining "pattern" in a later provision of the same bill, Congress was more enlightening: "criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characterictics and are not isolated events." 18 U.S.C. § 3575(e) 18 USCS § 3575(e). This language may be useful in interpreting other sections of the Act.
>
> *Sedima*, 105 S.Ct. at 3285 n.14.

tiff had satisfied the "relationship" prong of the *Sedima* test, but not the "continuity" prong. The Eighth Circuit explained that proof of a "pattern" of racketeering activity requires more than proof of one racketeering activity and the threat of continuing activity. It is the factor of "continuity plus relationship" which combines to produce a pattern. The court found that proof of a single fraudulent scheme, implemented by several fraudulent acts, does not constitute a "pattern" of racketeering activity for RICO purposes. While the "relationship" prong of the pattern test is met by proof of several related acts of mail and wire fraud, in the absence of proof that the defendants "had ever done these activities in the past . . . [or] that they were engaged in other criminal activities elsewhere," *Superior Oil*, 785 F.2d at 257, it could not be said that plaintiffs had proved "continuity" sufficient to establish their RICO claims. The court concluded:

> [Plaintiff] has, however, failed to prove the "continuity" sufficient to form a "pattern of racketeering activity." The actions of [defendants] comprised one continuing scheme to convert gas from [plaintiff's] pipeline. . . . On the facts of this case, we agree with the court's conclusion in *Northern Trust Bank/O'Hare, N.A. v. Inryco, Inc.*, 615 F.Supp. 828, 832 (D.C.Ill. 1985), that "[i]t is difficult to see how the threat of continuing activity stressed in the Senate Report could be established by a single criminal episode. * * * It places a real strain on the language to speak of a single fraudulent effort, implemented by several fraudulent acts, as a "pattern of racketeering activity."

Superior Oil, 785 F.2d at 257 (footnote omitted).

In *Holmberg*[3] plaintiff offered proof of several acts of wire or mail fraud related to a common purpose or scheme. The Eighth Circuit found that plaintiff had satisfied the "relationship" prong of *Sedima*. As in *Superior Oil*, however, the Court found that plaintiff had not satisfied the "continuity" prong. Because defendants' acts of wire and mail fraud were undertaken as part of a common purpose or scheme, there was no showing of continuity, notwithstanding that the single fraudulent effort was implemented by several acts of wire or mail fraud. The court stated: "[t]here was no evidence that [the defendants] had engaged in like activities in the past or that they were engaged in other criminal activities." *Holmberg*, slip op. at 9. In the absence of proof of like past or other present fraudulent activity, plaintiffs' civil RICO cause of action was dismissed.

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[3] In *Holmberg* the Eighth Circuit cited definitions of "pattern" drawn from the Omnibus Crime Control Act of 1970, 18 U.S.C. § 3575(e), wherein Congress provided that "criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." The *Holmberg* court also looked to legislative history for guidance, citing the following definition of "pattern" drawn from Senate reports:

> The concept of "pattern" is essential to the operation of the statute . . . . The target of [RICO] is . . . not sporadic activity. The infiltration of legitimate business normally requires more than one "racketeering activity" and the threat of continuing activity to be effective. It is this factor of continuity plus relationship which combines to produce a pattern.

Holmberg, slip op. at 9, quoting S.Rep.No. 617, 91st Cong. 2d Sess. 158 (1969).

Distilled to their essence, *Sedima*, *Superior Oil*, and *Holmberg* give rise to the following governing principles. In order to establish a "pattern" of racketeering activity plaintiffs must allege and prove (1) relationship, and (2) continuity. The relationship prong is satisfied by proof of several related acts in furtherance of a single criminal scheme. *Superior Oil*, 785 F.2d at 257; *Louisiana Power and Light Co. v. United Gas Pipe Line Co.*, CIVIL No. 84-5156, slip op. at 51 (E.D.La. Aug. 15, 1986); *Frankart Distributors, Inc. v. RMR Advertising, Inc.*, 632 F.Supp. 1198 (S.D.N.Y. 1986); *Simon*, slip op. at 10. The continuity prong is satisfied by proof that the defendants have committed the same or similar racketeering activities in the past or are engaged in other criminal activities elsewhere. *Superior Oil*, 785 F.2d at 257; *Holmberg*, slip op. at 9-10.[4]

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[4] See, e.g., *Simon v. Fribourg*, CIVIL No. 4-86-259, slip op. at 9-10 (D.Minn. Aug. 20, 1986) wherein the court declared:

> "[P]roof of a 'pattern of racketeering activity' 'requires more than one 'racketeering activity" and the threat of continuing activity to be effective. It is the factor of *continuity plus relationship* which combines to produce a pattern.'" *Superior Oil Co. v. Fulmer*, 785 F.2d 252, 257 (8th Cir. 1986) (emphasis in original) (quoting *Sedima*, 105 S. Ct. at 3275 n. 14). In *Superior Oil*, the plaintiff proved "several related acts of mail and wire fraud" in furtherance of a single crime—the conversion or theft of gas from plaintiff's pipeline. This satisfied the "relationship" prong of the *Sedima* test, but not the "continuity" prong. The failing in plaintiff's evidence was its inability to demonstrate that defendants had engaged in any other criminal activity. *Superior Oil*, 785 F.2d at 257.

Simon, slip op. at 9-10. In *Simon* the court found that plaintiff had failed to allege a civil RICO claim because the racket-

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Applying these principles to the case at bar, it is clear that plaintiffs have satisfied the first prong of the *Sedima* "pattern" test. Plaintiffs have alleged a "relationship" among and between the predicate acts of racketeering allegedly committed by defendants. Quite clearly, the acts allegedly committed by defendants—the alleged illicit distribution of tickets and other amenities to MPUC commissioners during the period 1981 to the present; uncompensated plane rides and excursions to Canterbury Downs during the same period; alleged illicit payments and promises of employment to MPUC commissioners Hanson and Satterlee—were related acts in furtherance of a single alleged criminal scheme, *i.e.*, all were designed to influence MPUC commissioners on behalf of Northwestern Bell.

As to the "continuity" prong of the *Sedima* test, however, plaintiffs' cause of action is much more problematical. While plaintiffs have alleged the existence of several fraudulent acts, each of these acts was committed in furtherance of a *single fraudulent scheme*. Here, as in *Superior Oil*, *Holmberg*, and *Simon*, there simply are no allegations that the defendants have engaged in "like activities in the past" or that defendants are engaged in "other criminal activities" elsewhere. *Superior Oil*, 785 F.2d at 257; *Holmberg*, slip op. at 10; *Simon*, slip op. at

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eering acts alleged by plaintiff were "all committed in furtherance of a single criminal act." *Simon*, slip op. at 10. In the absence of proof that the defendants had "concocted a similar scheme in any other year or that they were otherwise involved in any criminal activity" plaintiff's RICO claims must fail, the court found. *Simon*, slip op. at 10.

10. The *Superior Oil-Holmberg* construction of the *Sedima* "pattern" test is extremely restrictive—in order to establish a pattern of racketeering activity plaintiffs must allege and prove multiple illegal schemes, of which the case at bar presents a separable episode. Each of the fraudulent acts alleged by plaintiffs was committed in furtherance of a single scheme to influence MPUC commissioners to the detriment of Northwestern Bell's ratepayers. Plaintiffs do not allege that the defendants have engaged in like wrongful activity in the past or are engaged in other wrongful activity elsewhere. *See Northern Trust Bank/O'Hare, N.A. v. Inryco, Inc.*, 615 F.Supp. 828, 832 (N.D.Ill. 1985) (the common sense interpretation of "pattern" implies acts occurring in different criminal episodes, episodes that are at least somewhat separated in time and place yet still sufficiently related by purpose to demonstrate a continuity of activity). Absent allegations of separable criminal episodes, plaintiffs' cause of action simply does not fit the RICO paradigm—the infiltration of legitimate business by criminal conduct which embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events. It is apparent that plaintiffs have attempted to splinter a series of related acts into a civil RICO cause of action. *Professional Assets Management, Inc. v. Penn Square Bank, N.A.*, 616 F.Supp. 1418, 1423 (W.D.Okla. 1985). As such, plaintiffs' allegations fall short of establishing a "pattern" within the meaning of the RICO statute. Here, as in *Superior Oil* and *Holmberg*, "[i]t places a real strain on the language to speak of a single fraudulent effort, implemented by several

fraudulent acts, as a 'pattern of racketeering activity.'" *Superior Oil*, 785 F.2d at 257; *Holmberg*, slip op. at 10. *See, e.g., Allington v. Carpenter*, 619 F.Supp. 474 (C.D. Cal. 1985) (three acts of wire fraud in connection with a single isolated fraudulent scheme comprised a single criminal episode rather than a "pattern" of racketeering activity); *Morgan v. Bank of Waukegan*, 615 F.Supp. 836, 838 (N.D.Ill. 1985) (single plot spread over several years does not satisfy the pattern requirement); *Cullen v. Nassau County Republican Committee*, II RICO Law Rptr. 564 (E.D.N.Y. 1985) (to establish pattern plaintiffs must show that crimes constituted part of a larger pattern of criminal activity); *Exeter Towers Associates v. Bowditch*, 604 F.Supp. 1547 (D.Mass. 1985) (two acts of mail fraud in connection with the purchase of a single mortgage does not constitute a pattern); *Teleprompter of Erie, Inc. v. City of Erie*, 537 F.Supp. 6 (W.D.Pa. 1981) (multiple bribes received by councilman at a political fundraiser did not constitute a pattern).

Plaintiffs cite various decisions of other courts in other circuits where proof of various predicate acts engaged in over a significant period of time has been held to satisfy the "pattern" requirement of civil RICO.[5] *See*

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[5] In a recent decision, *Morgan v. Bank of Waukegan*, 55 U.S.L.W. 2255 (7th Cir. Oct. 23, 1986), the United States Court of Appeals for the Seventh Circuit noted that the "continuity" aspect of the pattern requirement in the aftermath of *Sedima* footnote 14 has created a conflict among the circuits. The Eleventh Circuit has rejected the proposition that the predicate acts must occur in different criminal episodes or schemes, *Bank of America v. Touche Ross & Co.*, 782 F.2d 966 (11th Cir. 1986), while in contrast the Eighth Circuit has held that where

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Illinois Dept. of Revenue v. Phillips, 771 F.2d 312, 313 (7th Cir. 1985) (defendants' act of mailing nine fraudulent tax returns over a nine-month period constitutes pattern of racketeering); *First Federal Savings and Loan Association of Pittsburgh v. Oppenheim, Appel, Dixon & Co.*, 629 F.Supp. 427, 445 (S.D.N.Y. 1986) (predicate mail fraud acts arising out of a single scheme constitute pattern); *Pappagiannis v. Pontikis*, 105 F.R.D. 177 (N.D. Ill. 1985) (perpetration of fraud on more than one victim constitutes pattern); *United States v. Freshie Co.*, 639 F.Supp. 442 (E.D.Pa. 1986) (related but distinct methods of criminal activity engaged in over a substantial period of time rose to the level of a pattern of racketeering activity). Were the Court writing on a clean slate, these cases might well be persuasive. In the Eighth Circuit, however, the slate is far from clean.[6] *Superior Oil* and *Holmberg* are on

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all predicate acts were committed in furtherance of a single scheme the continuity requirement has not been met, as discussed above. In *Morgan* the Seventh Circuit elected to steer the middle ground, holding that "[i]n order to be sufficiently continuous to constitute a pattern of racketeering activity, the predicate acts must be ongoing over an identified period of time so that they fairly be viewed as constituting separate transactions, *i.e.*, 'transactions 'somewhat separated in time and place." . . .

[6] One court has identified three positions which the courts have taken in construing the continuity and relationship test. At one extreme, plaintiff is required to prove that the defendant was engaged in multiple illegal schemes. This is the position taken by the Eighth Circuit in *Superior Oil* and *Holmberg*. At the other extreme, courts have held that allegations of two related predicate acts is sufficient. An intermediate position taken by some courts requires proof of multiple criminal episodes evincing an ongoing practice or activity. *See Louisiana Power and Light*, slip op. at 52-53.

all fours with the instant case. Under *Superior Oil* and *Holmberg*, plaintiffs have failed to show the requisite "continuity." Accordingly, plaintiffs' RICO claims must be dismissed.

Although plaintiffs' failure to satisfy the continuity prong of the *Sedima* pattern test is fully dispositive of plaintiffs' RICO claims, in the interest of thoroughness, certain of defendant's remaining arguments for dismissal will be briefly addressed.

2. *Enterprise-Person Distinction*

RICO was passed as part of the Organized Crime Control Act. *United States v. Hartley*, 678 F.2d 961, 987 (11th Cir. 1982). Its primary purpose was "to eradicate organized crime and corruption." *United States v. Lee Stroller Enterprises, Inc.*, 652 F.2d 1313, 1317 (7th Cir. 1981). In *United States v. Turkette*, 452 U.S. 576 (1981), the United States Supreme Court interpreted RICO as requiring proof of an "enterprise" engaged in a "pattern of racketeering activity." 452 U.S. at 583. "Enterprise" as defined in 18 U.S.C. § 1961(4) "includes any partnership, corporation, association, or other legal entity, any union or group of individuals associated in fact although not a legal entity." Under *Turkette*, the existence of such an enterprise must be established by "evidence that the various associates function as a continuing unit." *Turkette*, 452 U.S. at 583. Moreover, the enterprise must be shown to have an existence "separate and apart from the pattern of activity in which it engages." *Turkette*, 452 U.S. at 583; *Bennet v. E.F. Hutton, Inc.*, 597 F.Supp. 1547, 1559 (N.D.Ohio 1984).

Defendant moves for dismissal of plaintiffs' Count II on the ground that Count II names Northwestern Bell as both the "person" and the "enterprise" for purposes of plaintiffs' section 1962(a) claim. Defendant argues that Northwestern Bell cannot be both the "person" and the "enterprise" and that Count II is thus fatally defective.

RICO proscribes conduct in which one party, the "person" subject to the statute, acts upon an entity, the "enterprise," in such a manner that the enterprise's affairs are conducted through a pattern of racketeering. *Bennett v. Berg*, 685 F.2d 1053, 1061 (8th Cir. 1982). While some courts have held that a legal entity or formal enterprise which has actively participated and benefited from a pattern of racketeering activity can be named as *both* the enterprise and the person, *see United States v. Hartley*, 678 F.2d 961 (11th Cir. 1982), the majority position, and the one adopted in this circuit and district, is that the RICO "enterprise" cannot also be the RICO "person." *See Rae v. Union Bank*, 725 F.2d 478, 481 (9th Cir. 1984); *United States v. Computer Sciences Corp.*, 689 F.2d 1181, 1190 (4th Cir. 1982). In *Bennett v. Berg*, 685 F.2d 1053 (8th Cir. 1982), the Eighth Circuit dismissed one count of plaintiff's complaint for failure to draw a distinction between the RICO enterprise and the RICO person. The *Bennett* ruling was reaffirmed in *Alexander Grant & Co. v. Tiffany Industries, Inc.*, 742 F.2d 408, 411 n.6 (8th Cir. 1984), *vacated on other grounds and remanded for reconsideration in light of Sedima*, 105 S.Ct. 3550 (1985), *on remand* 770 F.2d 717 (1985), where the court stated:

> We do observe that [plaintiff's] original complaint alleges that [defendant] is both a "person" and an "enterprise" within the meaning of section 1962(c). It was precisely because of the possibility of such an identity that we held that count II of the complaint in *Bennett v. Berg* [citation omitted] failed to state a claim.

In *Minnesota Odd Fellows Home Foundation v. Engler & Budd Co.*, 630 F.Supp. 797 (D.Minn. 1986), the court found that "in the Eighth Circuit, it is necessary to allege an 'enterprise' separate from the 'person' who allegedly associates with the enterprise." *Odd Fellows*, 630 F.Supp. at 800, *citing Bennett v. Berg*, 685 F.2d at 1089. Because plaintiff in that case had failed to allege the existence of an "enterprise" separate and distinct from the "person" associated with the enterprise, the court dismissed plaintiff's RICO claims.

Plaintiffs' Count II alleges:

> 48. Northwestern Bell Telephone Company is a person within the meaning of 18 U.S.C. 1961(3).
>
> 49. The person referred to in paragraph 48 is also an ongoing enterprise within the meaning of 18 U.S.C. 1961(4).

Amended Complaint ¶¶ 48, 49. Quite clearly, plaintiffs have failed to allege a RICO "enterprise" separate and distinct from a RICO "person." Plaintiffs argue, however, that *Bennett* is not controlling in that the *Bennett* plaintiff's cause of action arose under section 1962(c) of RICO, whereas plaintiffs' Count II arises under section 1962(a). Some courts have held that in actions arising under section 1962(a) the enterprise and the person need not be distinct. *See, e.g., B.F. Hirsch v. Enright Refining Co.*, 751 F.2d 628 (3d Cir. 1984); *United States v. Freshie*

Co., 639 F.Supp. 442 (E.D.Pa. 1986). Other courts have held that the person-enterprise distinction pertains to 1962 (a) actions as well as 1962(c) actions. *See, e.g., Kredietbank, N.V. v. Joyce Morris, Inc.*, CIVIL No. 84-1903 (D. N.J. Jan. 9, 1986); *Rush v. Oppenheimer & Co.*, 628 F. Supp. 1188, 1196-98 (S.D.N.Y. 1985); *Computer Sciences*, 689 F.2d at 1190. The Court finds that in a 1962(a) action, as in a 1962(c) action, plaintiff must allege the existence of an "enterprise" separate and distinct from the "person" identified, for the following reasons:

(1) Both 1962(a) and 1962(c) speak[7] of a "person" committing an unlawful act in connection with, but distinct

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[7] RICO section 1962(a) provides:

> It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity . . . in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. . . . .

The thrust of section 1962(a) is a proscription on the use or investment of illegally acquired funds in an enterprise.

RICO, section 1962(c) provides:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

The thrust of section 1962(c) is wrongful association with and control of an "enterprise" by a "person."

from, an "enterprise." The consistent use of the two different terms "person" and "enterprise" throughout section 1962 indicates an intent to distinguish those actors throughout.

(2) As stated in *Bennett v. Berg*, "the RICO act proscribes conduct in which one party, the 'person' subject to the statute, acts upon an entity, the 'enterprise' . . . ." *Bennett*, 685 F.2d at 1061. In making this statement, the Eighth Circuit did not distinguish between (a) and (c) of section 1962, and nothing in *Bennett* gives rise to an inference that the court would view section (a) differently from section (c) for purposes of the separate person-enterprise requirement. Absent proof of a "person" acting upon an "enterprise," RICO is inapplicable, by virtue of the plain language of *Bennett*.

(3) Permitting a RICO cause of action where it is alleged that a corporate entity has conducted its own affairs through a pattern of racketeering activity, without any proof of infiltration of that enterprise by outside "persons," would not comport with congressional intention, inasmuch as one of the primary purposes of Congress in enacting RICO was to prevent the takeover of legitimate business by criminals and corrupt organizations. *B. F. Hirsch*, 751 F.2d at 633.

(4) Sections (a) and (c) of 1962 require the presence of the same elements—conduct of an enterprise, a pattern of racketeering activity, and a person. Only the relationship among these elements differs. Section (c) envisions racketeering acts conducted through an enterprise, whereas section (a) portrays the enterprise as the investment object of the criminal violators. Under either (a) or (c), the enterprise must be acted upon by a distinct "person."

(5) A construction of (a) which would obviate the separate enterprise-person requirement would be contrary to the restrictive reading of RICO given by the Eighth Circuit in *Superior Oil* and *Holmberg* and would "aggravate the already hopeless deviation of the RICO statute from its intended purpose in ferreting out organized crime." *Rush v. Oppenheimer & Co.*, 628 F.Supp. 1188, 1197 (S.D.N.Y. 1985).

Accordingly, based on the foregoing, the Court finds that plaintiffs' Count II is deficient as a matter of law.

D. *Filed Rate Doctrine*

Northwestern Bell argues that dismissal of plaintiffs' RICO claims is necessitated by the federal "filed rate" doctrine. In *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246 (1951), the Supreme Court affirmed the district court's dismissal of an action predicated on allegations that plaintiffs were forced to pay unreasonably high rates due to misrepresentations made by the defendant in rate proceedings before the Federal Power Commission (FPC). The Supreme Court held that the FPC had exclusive authority to determine a reasonable rate, and that the FPC's decision was conclusive. In *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1981), the Supreme Court reversed the trial court's award of damages measured by the difference between the price defendant had paid to plaintiff pursuant to Federal Energy Regulatory Commission (FERC) approved rates and the price defendant had paid others. The Court held that the "filed rate" doctrine forbids an award of damages based on an estimation of what the FERC "might have done had it been faced with the facts of

[the] case." *Arkansas Gas*, 453 U.S. at 578-79. Northwestern Bell also relies on a line of federal antitrust cases, wherein the courts have held that antitrust plaintiffs are precluded from obtaining damages based on alleged illegal price fixing of utility rates, where the alleged damages are measurable by a comparison of the approved tariff and the tariff that would have been approved absent defendant's wrong-doing. *See Keough v. Chicago & Northwestern Ry.*, 260 U.S. 156, 163 (1922); *Square D Co. v. Niagra Frontier Tariff Bureau, Inc.*, 106 S.Ct. 1922 (1986). Northwestern Bell argues that the *Keough* line of antitrust cases has relevance to a RICO action because (1) both RICO and the Clayton Act grant a cause of action to one "injured in his business or property," and because (2) both RICO and the Clayton Act provide for the award of treble damages. Defendant argues that the analogous nature of the Clayton Act and RICO remedies make the *Keough* line of cases of valid precedential authority in a RICO case.

Montana-Dakota, *Arkansas Gas*, and the *Keough* line of cases are squarely on point with plaintiffs' RICO claims. Plaintiffs seek to recover damages measurable by a comparison of MPUC-approved rates and the rates that would have been approved but for defendants' wrongdoing. Under the "filed rate" doctrine, plaintiffs' cause of action is not federally cognizable. The MPUC has exclusive authority to determine a reasonable rate, and the MPUC's decision is conclusive, subject to statutory process. Even assuming that plaintiffs have satisfied the "continuity" prong of *Sedima*, plaintiffs' action must be dismissed by virtue of the filed rate doctrine.

removable claims); *Houlihan v. Anderson-Stokes, Inc.*, 434 F.Supp. 1324, 1329 (D.D.C. 1977) (federal claims dismissed at early stage). Count I of the amended complaint raises an issue of first impression as to the implication of a private cause of action under the Minnesota criminal bribery statute. Needless decision of this unsettled state law issue is best avoided. *Girard v. 94th Street & Fifth Ave. Corp.*, 530 F.2d 66 (2d Cir.), *cert. denied*, 425 U.S. 974 (1976); *Briggs*, 455 F.Supp. at 82 (novel questions of state law). In sum, no "unusual circumstances," *Nolan v. Meyer*, 520 F.2d 1276, 1280 (2d Cir.), *cert. denied*, 423 U.S. 1034 (1975), justifying federal jurisdiction over the pendent state claims are present here. Consequently, plaintiffs' Count I will be dismissed without prejudice as outside the subject matter jurisdiction of the court. *See Kuhn v. National Association of Letter Carriers, Branch 5*, 570 F.2d 757, 761 (8th Cir. 1978) (district court did not have power to consider pendent state claim because it did not have jurisdiction over the federal claim).

Based on the foregoing, and upon all the files, records, and proceedings in this matter,

IT IS ORDERED that:

1. plaintiffs' motion to strike defenses is denied;

2. defendant's motion to dismiss Counts II-V of plaintiffs' amended complaint is granted; and

3. defendant's motion to dismiss Count I of plaintiffs' amended complaint is granted, and Count I is dismissed without prejudice.

LET JUDGMENT BE ENTERED ACCORDINGLY.

E. *State Law Claims*

Plaintiffs' Count I is a state law claim arising under Minn. Stat. § 609.42 and the common law of bribery. In *United Mine Workers of America v. Gibbs*, 383 U.S. 715 (1966), the seminal case on the pendent jurisdiction of the federal courts, the United States Supreme Court stated that "if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well." 383 U.S. at 726. This bold statement has been subsequently qualified somewhat, the Court stating in *Rosado v. Wyman*, 397 U.S. 397 (1970) that whether to proceed with state claims lacking an independent basis of federal jurisdiction after all federal claims have been dismissed is discretionary with the trial court. 397 U.S. at 404; *Silva v. Vowell*, 621 F.2d 640 (5th Cir. 1980); *McGann v. Mungo*, 578 F.Supp. 1413 (D.S.C. 1982). Factors to consider in the exercise of the Court's discretion include considerations of judicial economy, convenience and fairness to litigants, and the avoidance of needless decisions of state law. *Gibbs*, 383 U.S. at 726. *Reyes v. Edmunds*, 416 F.Supp. 649 (D.Minn. 1976). *See also Koke v. Stifel, Nicolaus & Co.*, 620 F.2d 1340, 1346 (8th Cir. 1980) (adopting *Gibbs* factors); *Pink Supply Corp. v. Hiebert, Inc.*, 612 F.Supp. 1334, 1347 (D.Minn. 1985).

Each of the relevant factors supports dismissal of plaintiffs' pendent state law claims. The case is still at an early stage, so that there has been no substantial commitment of federal judicial resources. *See, e.g., Briggs v. American Air Filter Co.*, 455 F.Supp. 179 (N.D.Ga. 1978) (no substantial commitment of judicial resources to non-

/s/ Harry H. MacLaughlin
Judge Harry H. MacLaughlin
United States District Court

DATED: November 21, 1986

APPENDIX G

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

H.J. Inc., a Minnesota corporation, Kirk Dahl, Larry Krugen and Mary Krugen, individually and d/b/a Photo Images, Susan Davis, Robert Neal, Isaac H. Ward, Richard L. Anderson, Thomas J. Mott, and all others similarly situated, Plaintiffs, vs. Northwestern Bell Telephone Company, a subsidiary of U.S. West, A.B.C. individually and D.E.F. as corporations, and other unnamed Co-conspirators, Defendants.	File No. CV 4 86 0546 DEFENDANT NORTHWESTERN BELL TELEPHONE COMPANY'S NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFFS' RICO CLAIMS

TO: Plaintiffs H.J. Inc., Kirk Dahl, Larry Krugen, Mary Krugen, Photo Images, Susan Davis, Robert Neal, Isaac H. Ward, Richard L. Anderson, and Thomas J. Mott, and to their attorneys Cochrane & Bresnahan, 24 East Fourth Street, Saint Paul, Minnesota 55101, and Reinhardt and Anderson, Town Square, 1014 Conwed Tower, 444 Cedar Street, Saint Paul Minnesota 55101

PLEASE TAKE NOTICE that at 10:00 a.m. on Wednesday, October 1, 1986, or as soon thereafter as counsel may be heard, defendant Northwestern Bell Telephone Company will move the above-named Court before

the Honorable Harry H. MacLaughlin, United States District Judge, at the United States Courthouse, 110 South Fourth Street, Minneapolis, Minnesota, for an order pursuant to Federal Rule of Civil Procedure 12(b)(6) dismissing the RICO claims alleged in Counts II, III, IV, and V of plaintiffs' First Amended Complaint for failure to state a claim upon which relief can be granted.

This motion is based upon all the files, records, and proceedings herein, including the accompanying Memorandum of Law in support of this motion.

Dated: September 10, 1986

FAEGRE & BENSON

/s/ By James L. Volling
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APPENDIX H

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

H.J. Inc., a Minnesota corporation, Kirk Dahl, Larry Krugen and Mary Krugen, individually and d/b/a Photo Images, Susan Davis, Robert Neal, Isaac H. Ward, Richard L. Anderson, Thomas J. Mott, and all others similarly situated, Plaintiffs, v. Northwestern Bell Telephone Company, a subsidiary of U.S. West, A.B.C. individually and D.E.F. as corporations, and other unnamed Co-conspirators, Defendants.	File No. CV 4 86 0546 ANSWER OF DEFENDANT NORTHWESTERN BELL TELEPHONE COMPANY TO FIRST AMENDED COMPLAINT

Defendant Northwestern Bell Telephone Company (hereinafter, the "Defendant"), for its answer to the first amended complaint (hereinafter "complaint") herein, alleges and states:

FIRST DEFENSE

1. Except as otherwise specifically admitted, answered, or qualified herein, every allegation, statement, matter or thing set forth in the complaint is hereby expressly denied.

2. Answering paragraphs 1 and 2 of the complaint, Defendant admits that it resides in this district and trans-

acts a part of its business within this district, but Defendant denies that this Court has jurisdiction over it for purposes of this action and denies that venue properly lies in this district for purposes of this action.

3. Answering paragraph 3 of the complaint, Defendant states that it assumes that the term "Northwestern Bell" refers to the Defendant. Based on his assumption, Defendant further states that it is an Iowa corporation and a subsidiary of Northwestern Bell Corporation, which is, in turn, a subsidiary of U.S. West, Inc. Further answering paragraph 3, Defendant admits that it is a telecommunications company supplying telephone service in the State of Minnesota and that it is engaged in interstate commerce.

4. Answering paragraph 4 of the complaint, Defendant states that it is without knowledge or information sufficient to form a belief as to the truth of the averments thereof.

5. Answering paragraph 5 of the complaint, Defendant admits that it has a customer named Kirk Dahl who has purchased both residential and business telephone service from Defendant; otherwise Defendant states that it is without knowledge or information sufficient to form a belief as to the truth of the averments thereof.

6. Answering paragraph 6 of the complaint, Defendant admits that it has a customer listed as L. Krugen, whose spouse is listed as Mary, who has purchased residential telephone service from Defendant and a customer named Photo Images that has purchased business telephone service from Defendant; otherwise Defendant states

that it is without knowledge or information sufficient to form a belief as to the truth of the averments thereof.

7. Answering paragraph 7 of the complaint, Defendant admits that it has a customer named S. J. Davis who has purchased residential telephone service from Defendant; otherwise Defendant states that it is without knowledge or information sufficient to form a belief as to the truth of the averments thereof.

8. Answering paragraph 8 of the complaint, Defendant admits that it has a customer named Robert Neal who has purchased both residential and business telephone service from Defendant; otherwise Defendant states that it is without knowledge or information sufficient to form a belief as to the truth of the averments thereof.

9. Answering paragraph 9 of the complaint, Defendant admits that it has a customer named Isaac H. Ward who has purchased residential telephone service from Defendant; otherwise Defendant states that it is without knowledge or information sufficient to form a belief as to the truth of the averments thereof.

10. Answering paragraph 10 of the complaint, Defendant admits that it has a customer named Richard L. Anderson who has purchased residential telephone service from Defendant; otherwise Defendant states that it is without knowledge or information sufficient to form a belief as to the truth of the averments thereof.

11. Answering paragraph 11 of the complaint, Defendant admits that it has a customer named Thomas J. Mott who has purchased residential telephone service from Defendant; otherwise Defendant states that it is without

knowledge or information sufficient to form a belief as to the truth of the averments thereof.

12. Answering paragraph 12 of the complaint, Defendant states that the averments of the paragraph are obviously in error, in that, by reason of cross-references to paragraphs 5 through 14, this paragraph identifies all but one of the named plaintiffs as "unnamed defendants." Assuming that the correct cross-references should be to paragraphs 13 through 22, Defendant states that it does not understand the concept of "unnamed defendants," that no such concept is contemplated by any statute or rule of law known to Defendant, and that the persons identified in this paragraph are not, and cannot be, "unnamed defendants" in this action. Defendant further denies that any of the persons identified in paragraphs 13 through 22 of the amended complaint "aided and abetted the defendants" or "conspired with the defendants to commit the acts alleged in Counts I-V" of the complaint.

13. Answering paragraphs 13 through 17 of the complaint, Defendant states that plaintiffs have failed to identify the "Commission" to which these paragraphs refer. On the assumption that "Commission" as used in these paragraphs is intended to refer to the Public Utilities Commission of the State of Minnesota, Defendant states that it believes that Harry Crump and Barbara Beerhalter now are members of the said Commission, and that Leo Adams, Roger Hanson and Juanita Satterlee at some time in the past have been members of the said Commission, but Defendant does not know the precise dates of the terms of office served by them as members of the said Commission.

14. Answering paragraph 18 of the complaint, Defendant admits that Robert W. Johnson is an attorney licensed to practice law in the State of Minnesota and is counsel for the Minnesota Telephone Association.

15. Answering paragraph 19 of the complaint, Defendant admits that Roy Larson is an employee of Defendant.

16. Answering paragraph 20 of the complaint, Defendant admits that Roy Weir was an employee of Defendant, denies that Mr. Weir was an officer of Defendant, and states that Mr. Weir retired from Defendant's employ at the end of February 1986.

17. Defendant admits the allegations of paragraph 21 of the complaint.

18. Assuming that "Northeastern Bell" refers to Defendant, Defendant admits the allegations of paragraph 22 of the complaint.

19. Answering paragraphs 23 through 28 of the complaint, Defendant admits that plaintiffs purport to bring this action as a class action and that plaintiffs have retained competent counsel but denies the remaining allegations of these said paragraphs and denies that this action is properly maintainable as a class action.

20. Answering paragraph 29 of the complaint, Defendant states that it does provide telecommunications service within the State of Minnesota and that it is engaged in interstate commerce. Defendant admits that it did, prior to January 1, 1984, sell or lease telecommunication equipment; that it provides telephone service and access to long distance service; that it owns and operates tele-

phone lines and exchanges; and that it performs other telecommunication functions. Defendant also admits that, within the limitations of specific statutory provisions, the Minnesota Public Utilities Commission has jurisdiction over some activities of Defendant and other telephone companies, including some aspects of rate making.

21. Defendant denies the allegations of paragraph 30 of the complaint.

22. Answering paragraph 31 of the complaint, Defendant admits that on June 26, 1986, Public Utilities Commissioner Harry Crump rode between Oklahoma and Minneapolis on an airplane owned by Defendant. Defendant denies that this trip was made free of charge and states that it was reimbursed for the value of this airplane ride by the State of Minnesota. Defendant denies that this airplane ride was provided to Mr. Crump by Defendant's employee, Ray Larson. Defendant further states that the ride was offered to Mr. Crump because there was unused space on Defendant's airplane; Defendant's airplane would have made the trip regardless of Mr. Crump; and Mr. Crump indicated his previously planned means of transportation was confronting him with extreme scheduling difficulties.

23. Defendant denies the allegations of paragraph 32 through 36 of the complaint.

24. Defendant denies the allegations of paragraph 37 of the complaint and further states that with the knowledge and approval of Gene Bier, Roy Weir had an exploratory meeting with Roger Hanson during December 1984 during which Mr. Weir and Mr. Hanson discussed the possibility that a group of telephone companies might be interested in retaining Mr. Hanson as a consultant after the expiration of his term on the Commission. No offer was made or accepted at that meeting. Mr. Weir did not discuss with Mr. Hanson possible employment of Mr. Hanson by Defendant, and Mr. Bier did not have knowledge of or approve any discussion between M. Weir and Mr. Hanson regarding such possible employment of Mr. Hanson by Defendant.

25. Answering paragraph 38 of the complaint, Defendant admits that it paid fees in excess of $30,000 during the year 1985 which were received by Roger Hanson for consulting services. Defendant further admits that these fee payments were made to Robert W. Johnson for the benefit of Roger Hanson. Defendant further states that all such fees were paid by it during a period of time when Roger Hanson was a private citizen and not a member of the Minnesota Public Utilities Commission. Defendant further states that the fee payments were made to Robert W. Johnson pursuant to a plan whereby the consulting services of Roger Hanson were to be retained by a group of telephone companies, each of which would have paid its share of Mr. Hanson's fees to Mr. Johnson for transmittal to Mr. Hanson.

26. Answering paragraph 39 of the complaint, Defendant admits that Roger Hanson was reappointed to the Minnesota Public Utilities Commission on or about November 25, 1985, but denies that it made any fee payments for consulting services to Mr. Hanson after the date of his aforesaid reappointment.

27. Defendant denies the allegations of paragraph 40 of the complaint. Defendant further states that Thomas

Madison had one exploratory discussion with Juanita Satterlee during May 1983, while Ms. Satterlee was a member of the Minnesota Public Utilities Commission, concerning the possibility that Defendant might retain Ms. Satterlee as a consultant after her previously planned resignation from the Commission. No offer was then made to Ms. Satterlee and a number of additional discussions took place between Defendant and Ms. Satterlee after she left the Minnesota Public Utilities Commission prior to Defendant's offer to retain Ms. Satterlee as a consultant.

28. Answering paragraph 41 of the complaint, Defendant states that its first payment of fees and expenses to Ms. Satterlee for consulting services was received by her in December 1983 and that Defendant's fee and expense payments to Ms. Satterlee from December 1983 through December 1984 totalled $106,129.

29. Answering paragraph 42 of the complaint, Defendant states that between July 1980 and the present Defendant reimbursed certain employees for legitimate business expenses authorized by law and incurred in connection with meetings between said employees and various Commissioners. The total value of all said expenses during said six-year period did exceed two thousand dollars and were for expenditures for meals and a few tokens of nominal value.

30. Answering paragraph 43 of the complaint, Defendant incorporates by reference and hereby realleges paragraphs 1 through 29 of this answer.

31. Defendant denies the allegations of paragraph 44 through 46 of the complaint.

32. Answering paragraph 47 of the complaint, Defendant incorporates by reference and hereby realleges paragraphs 1 through 31 of this answer.

33. Defendant denies the allegations of paragraphs 48 through 54 of the complaint.

34. Answering paragraph 55 of the complaint, Defendant incorporates by reference and hereby realleges paragraphs 1 through 33 of this answer.

35. Defendant denies the allegations of paragraphs 56 through 62 of the complaint.

36. Answering paragraph 63 of the complaint, Defendant incorporates by reference and hereby realleges paragraphs 1 through 35 of this answer.

37. Defendant denies the allegations of paragraphs 64 through 70 of the complaint.

37. Answering paragraph 71 of the complaint, Defendant incorporates by reference and hereby realleges paragraphs 1 through 37 of this answer.

39. Defendant denies the allegations of paragraphs 72 through 75 of the complaint.

SECOND DEFENSE

40. The complaint fails to state a claim upon which relief can be granted.

THIRD DEFENSE

41. This court lacks jurisdiction over the subject matter of this action.

FOURTH DEFENSE

42. The venue of this action is improper.

FIFTH DEFENSE

43. This action is barred in whole or in part by the applicable statutes of limitations.

SIXTH DEFENSE

44. Primary jurisdiction to determine the rates underlying plaintiffs' claims for damages resides in the Minnesota Public Utilities Commission.

SEVENTH DEFENSE

45. Plaintiffs have failed to exhaust their administrative and judicial remedies under the laws of the State of Minnesota.

EIGHTH DEFENSE

46. Plaintiffs' claims against Defendant fail to comply with the pleading requirements of Federal Rules of Civil Procedure 8, 9(b), and 11.

NINTH DEFENSE

47. Plaintiffs' claims against Defendant for alleged RICO violations are barred in that plaintiffs have failed to identify and properly plead the requisite "person," "enterprise," and "pattern of racketeering activity."

TENTH DEFENSE

48. Plaintiffs' claims against Defendant for alleged RICO violations are barred in that plaintiffs have not

been injured in their business or property by any conduct of Defendant.

ELEVENTH DEFENSE

49. Plaintiffs' pendent state law claims against Defendant are barred in that no private civil cause of action for bribery exists under Minnesota law.

TWELFTH DEFENSE

50. This Court should abstain from the exercise of jurisdiction until issues raised by the complaint are resolved by the Minnesota Public Utilities Commission.

Dated: August 4, 1986.

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APPENDIX I

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

H. J. Inc., a Minnesota Corporation, Kirk Dahl, Larry Krugen and Mary Krugen individually and d/b/a Photo Images, Susan Davis, Robert Neal, Isaac H. Ward, Richard L. Anderson, Thomas J. Mott, and all others similarly situated,

Plaintiffs,

vs.

Northwestern Bell Telephone Company, a subsidiary of U.S. West, A.B.C. individually and D.E.F. as corporations, and other unnamed Co-conspirators,

Defendants

FIRST AMENDED COMPLAINT

JURY TRIAL DEMANDED

File No: CV 4 86 0546

Plaintiffs, for their cause of action against defendants and each of them, complain as follows:

JURISDICTION AND VENUE

1. This action arises under and jurisdiction of this court is invoked under:

a) 18 U.S.C. 1964, subd. (a) and (e).

b) Applicable provisions of common law and Minn. Stat. § 609.42, subd. 1(1) and (2) under the Court's pendent jurisdiction.

2. The Defendants reside in this district and transact their affairs in this district. Venue properly lies in this district pursuant to 18 U.S.C. § 1965, subd. (a).

PARTIES

3. Northwestern Bell, a subsidiary of U.S. West, hereinafter Northwestern Bell, is a telecommunications company supplying telephone goods and services in the State of Minnesota and is engaged in interstate commerce.

4. H. J. Inc., is a Minnesota Corporation which has purchased from Northwestern Bell telecommunication goods and services at its principal place of business in Burnsville, Minnesota.

5. Kirk Dahl is a resident of the Township of West Lakeland, and has purchased from Northwestern Bell telecommunication goods and services at his home. He is a dentist with a practice in Lake Elmo, and has purchased from Northwestern Bell telecommunication goods and services at his business in the City of Lake Elmo.

6. Mary and Larry Krugen are residents of the city of Oakdale, and have purchased from Northwestern Bell telecommunication goods and services at their home. They are owners of Photo Images, a partnership, which has purchased from Northwestern Bell telecommunication goods and services at its place of business in Oakdale.

7. Susan Davis is a resident of the Township of Minnetonka, and has purchased from Northwestern Bell telecommunication goods and services at her home.

8. Robert Neal is a resident of Richfield, Minnesota, and has purchased from Northwestern Bell telecommunication goods and services at his home. He is a psychologist with a practice in Hennepin County and has purchased from Northwestern Bell telecommunication goods and services at his place of business.

9. Isaac H. Ward is a resident of Minneapolis, Minnesota and has purchased from Northwestern Bell telecommunication goods and services at his home.

10. Richard L. Anderson is a resident of White Bear Lake, Minnesota and has purchased from Northwestern Bell telecommunication goods and services at his home.

11. Thomas J. Mott is a resident of Little Canada, Minnesota and has purchased from Northwestern Bell telecommunication goods and services at his home.

12. Those named in paragraphs 5 through 14 are unnamed defendants, but aided and abetted the defendants and who conspired with the defendants to commit the acts alleged in Counts I-V herein.

13. Harry Crump was a member of the Commission from January 3, 1984 to the present.

14. Leo Adams was a member of the Commission from 1980 to January, 1986.

15. Barbara Beerhalter was a member of the Commission in 1984 to the present.

16. Roger Hanson was a member of the Commission in 1979 to January, 1985, and November 25, 1985 to January, 1986.

17. Juanita Satterlee was a member of the Commission from 1977 to 1983.

18. Robert Johnson is an attorney licensed to practice law in the State of Minnesota, and is counsel for the Minnesota Telephone Association.

19. Ray Larson is an employee of Northwestern Bell.

20. Roy Weir is an executive officer of Northwestern Bell.

21. Thomas Madison is an executive officer of Northwestern Bell.

22. Gene Bier is an executive officer of Northwestern Bell.

CLASS ACTION ALLEGATIONS

23. The plaintiffs bring this action pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of themselves and all other persons, firms and corporations (the class) who, during the period July 1, 1980 to the present, were either residential or business purchasers of the telecommunication goods and services provided by Northwestern Bell.

24. The members of the class are so numerous that joinder of all members is impracticable. The precise number of members of the class can be readily determined from defendants' records and files.

25. The claims of the plaintiffs are typical of the claims of the other members of the class. The plaintiffs

will fairly and adequately protect the interests of the class.

26. The plaintiffs have retained competent counsel experienced in the prosecution of class litigation.

27. Questions of law and fact common to the members of the class predominate over any questions affecting only individual members. These common questions of law and fact include among others:

a) Whether the defendants violated the Racketeer Influenced and Corrupt Organizations Act, Title 18 U.S.C. 1961-1968 as amended:

1) by committing acts in violation of 18 U.S.C. 1962(a), (b) and (c)

2) by conspiring to commit acts in violation of Title 18 U.S.C. § 1962(d)

b) By committing or attempting to commit acts of bribery in violation of common law and Minn. Stat. § 609.42, subd. 1(1) and (2).

28. Class action is superior to other available methods for the fair and effecient adjudication of this controversy.

FACTUAL ALLEGATIONS

29. During the relevant period alleged herein, the defendant, Northwestern Bell, was a telecommunications provider in the state of Minnesota engaged in interstate commerce. Specifically, it sold or leased telecommunication equipment, phone service, provided access to long distance service, owned and operated telephone lines and ex-

changes, and performed other telecommunication functions. Public Utilities Commission (P.U.C.) was given jurisdiction and supervisory power and rate making power over telephone companies doing business in the State of Minnesota on July 1, 1980 pursuant to Minn.Stat. § 237.02.

30. That from July 1, 1980 to the present and continuing, Northwestern Bell has attempted to, or did offer, gave or promised to give, directly or indirectly, to the public officials who were duly appointed commissioners of the Public Utilities Commission, benefits, rewards, and consideration, to which they were not legally entitled, with the intent to influence such officers with respect to the performance of their powers and duties as such officers of said commission.

Specifically but not limited to the following acts:

31. On June 26, 1985, Ray Larson provided P.U.C. member Harry Crump, with a free airplane ride between Oklahoma and Minneapolis.

32. In September 1985, P.U.C. member Harry Crump, was provided with an all expenses paid day at the Canterbury Downs race track by Northwestern Bell.

33. Between the year 1984 and the present, Commissioner Harry Crump was provided tickets to a Broadway play by Northwestern Bell.

34. Between the years 1984 and the present, Commissioner Harry Crump was provided with tickets to various sporting events paid for by Northwestern Bell.

35. P.U.C. Commissioner Leo Adams was provided with tickets to sporting events paid for by Northwestern Bell executives during the years 1981 to 1984.

36. In September 1985, P.U.C. Commissioner Barbara Beerhalter was provided with an all expense paid day at the Canterbury Downs race track paid for by Northwestern Bell.

37. That Northwestern Bell Lobbiest Roy Weir negotiated on the employment of Commissioner Roger Hanson with Northwestern Bell while Roger Hanson was still a Commissioner in November, 1984. These negotiations were discussed and approved by Gene Bier, Northwestern Bell's Chief Executive Officer.

38. Former Commissioner Roger Hanson received payments in excess of $30,000 from Northwestern Bell during the year 1985. These payments were not paid directly to Roger Hanson, but rather were paid to attorney Robert W. Johnson, and passed on to Roger Hanson.

39. Roger Hanson was reappointed to the P.U.C. on November 25, 1985 and payments continued to Robert W. Johnson for Roger Hanson.

40. Northwestern Bell executives, Thomas Madison and Roy Weir, negotiated employment with Northwestern Bell of P.U.C. Commissioner Juanita Satterly, while Juanita Satterly was still a member of the Commission in the spring of 1983.

41. Between the summer of 1983 and December of 1984, Northwestern Bell paid former Commissioner Juanita Satterly, $106,129.00.

42. Between July 1980 and the present, Northwestern Bell paid for presents for P.U.C. commissioners, paid for parties for P.U.C. commissioners, and paid for meals for

P.U.C. commissioners. The value of these items totaled thousands of dollars.

COUNT I

PENDENT STATE CLAIMS ASSERTED ON BEHALF OF THE CLASS

43. Plaintiffs incorporate by reference and reallege paragraphs 1 through 42 as if fully set forth in this count.

44. The defendant herein, violated state law in that it attempted to, or did, do acts and make payments that amounted to bribery of members of the Public Utilities Commission by offering, giving or promising to give, directly or indirectly, to those public officials, benefits, rewards, and consideration to which they were not legally entitled with intent thereby to influence such officers and employees, with respect to the performance of their powers and duties as such officer or employees, all in violation of Minn. Stat. § 609.42, subd. 1(1).

45. The defendant herein violated state law in that it conspired with, or aided and abetted a public officer or employee to request, receive or agree to receive, directly or indirectly, a benefit, reward or consideration to which said public officer or employee was not entitled with the understanding that he, the public officer or employee, would be influenced with respect to the performance of his powers or duties as such officer or employee, all in violation of Minn. Stat. § 609.42, subd. 1(2).

46. The defendant violated Minnesota common law in that they attempted to, or did, bribe public officials.

RICO CLAIMS

COUNT II

VIOLATION OF 18 U.S.C. 1962(a).

47. Plaintiffs incorporate by reference and reallege paragraphs 1 through 46 of this complaint as though fully set forth herein.

48. Northwestern Bell Telephone Company is a person within the meaning of 18 U.S.C. 1961(3).

49. The person referred to in paragraph 48 is also an ongoing enterprise within the meaning of 18 U.S.C. 1961(4).

50. Northwestern Bell has received income derived directly or indirectly through a pattern of racketeering activity involving at least two acts of bribery under Minn. Stat. § 609.42, subd. 1(1) and (2), all of which is in violation of 18 U.S.C. 1962(a).

51. The predicate acts of bribery are referred to in paragraphs 29 through 42 of this complaint.

52. That income was derived, either directly or indirectly, or the proceeds of such income was derived from said acts and said income was used in the operation of the enterprise.

53. That the enterprise engaged in, or its activities affected, interstate commerce.

54. That plaintiffs, and the class, were injured in their business or property by reason of this violation of 18 U.S.C. 1962(a).

COUNT III

VIOLATION OF 18 U.S.C. 1962(b)

55. Plaintiffs incorporate by reference and reallege paragraphs 1 through 54 above as if fully set forth herein.

56. Northwestern Bell Telephone Company, Thomas Madison, Harry Crump, Juanita R. Satterlee, Leo G. Adams, Roger Hanson, Barbara Beerhalter, Robert Johnson, Roy Wier, Ray Larson and Gene Bier are persons within the meaning of 18 U.S.C. 1961(3).

57. That the Public Utilities Commission is an enterprise within the meaning of 18 U.S.C. 1961(4).

58. That the persons named in paragraph 56, aided and abetted by each other, their agents and employees, and others, engaged in a pattern of racketeering activity consisting of at least two acts which involve bribery under Minn. Stat. § 609.42, sub. 1(1) and (2), all of which are in violation of 18 U.S.C. 1962(b).

59. That the persons referred to in paragraph 56 above, aided and abbetted by each other, their agents and employees, and others, through the pattern of racketeering activity described in paragraph 58 above, aquired or maintained, directly or indirectly, interest or control of the Public Utilities Commission, an enterprise above described.

60. The predicate acts of bribery are referred to in paragraphs 29 through 42 above.

61. Plaintiffs and the class were injured in their business or property by reason of this violation of 18 U.S.C. § 1962(c).

62. The enterprise engaged in or its activities affected interstate commerce.

COUNT IV

VIOLATION OF 18 U.S.C. 1962(c)

63. Plaintiffs incorporate by reference and reallege paragraphs 1 through 62 above as if fully set forth herein.

64. Northwestern Bell Telephone Company, Thomas Madison, Harry Crump, Juanita R. Satterlee, Leo G. Adams, Roger Hanson, Barbara Beerhalter, Robert Johnson, Roy Wier, Ray Larson and Gene Bier are persons within the meaning of 18 U.S.C. 1961(3).

65. The Public Utilities Commission is an enterprise within the meaning of 18 U.S.C. 1961(4).

66. The persons above named and others associated with or employed by those persons, were employed by, or associated with the enterprise.

67. The enterprise engaged in or its activities affected interstate commerce.

68. The persons above named, aided and abbetted by each other, their agents and employees, and others, conducted and participated directly or indirectly in the conduct and affairs of the enterprise through a pattern of racketeering activity consisting of at least two acts of bribery, all of which is in violation of 18 U.S.C. § 1962(c).

69. The predicate acts of bribery are referred to in paragraphs 29 through 42 above.

70. Plaintiffs and the class were injured in their business or property by reason of the above violation of 18 U.S.C. § 1962(c).

COUNT V

VIOLATION OF 18 U.S.C. § 1962(d)

71. Plaintiffs incorporate by reference and reallege paragraphs 1 through 70 above as is fully set forth herein.

72. Northwestern Bell Telephone Company, Thomas Madison, Harry Crump, Robert Johnson, Juanita R. Satterlee, Leo G. Adams, Roger Hanson, Barbara Beerhalter, Robert Johnson, Roy Wier, Ray Larson and Gene Bier are persons within the meaning of 18 U.S.C. 1961(3).

73. The persons in paragraph 72 above conspired together to violate the provisions of 18 U.S.C. § 1962(a), (b) and (c).

74. Plaintiffs and the class were injured in their business or property by reason of the above violation of 18 U.S.C. 1962(d).

DAMAGES

75. The plaintiffs and the class they seek to represent, were damaged in that, by reason of the actions alleged in Count I-V herein, the compensation Northwestern Bell was allowed to receive by the P.U.C. was in excess of what would be fair and reasonable charges to plaintiffs and members of the class, and that said unfair and unreasonable compensation was caused by the involvement in bribery, attempts to bribe, conspiracy and racketeering activities alleged in this complaint.

WHEREFORE, Plaintiffs and members of the class demand judgment against defendants as follows:

A. Declaring this to be a proper class action under Rule 23 of the Federal Rules of Civil Procedure;

B. As to all Counts, judgment against defendants jointly and severally for damages in an amount to be determined to have been sustained by plaintiffs and the other members of the class;

C. On all Counts, an award of appropriate interest, costs and disbursements of this action including reasonable attorneys fees in accord with 18 U.S.C. § 1964(c).

D. For an award of punitive and exemplary damages against defendants jointly and severally, in an amount to be awarded at trial.

E. For a treble damages award in accord with 18 U.S.C. § 1984(c).

F. For an injunction preventing the defendants from engaging in further illegal activity under Minn. Stat. § 609.42, or other activity prohibited by 18 U.S.C. § 1962 or any other applicable law.

G. For such other and further relief as this Court may deem just and proper.

JURY DEMAND

Plaintiffs demand trial by jury on all Counts.

Dated: July 15, 1986

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Supreme Court, U.S.
FILED
MAY 19 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1252

In The
Supreme Court of the United States
October Term, 1987

H.J. Inc., a Minnesota corporation, Kirk Dahl, Larry Krugen and Mary Krugen, individually and d/b/a Photo Images, Susan Davis, Robert Neal, Isaac H. Ward, Richard L. Anderson, Thomas J. Mott, and all others similarly situated,

Petitioners,

vs.

Northwestern Bell Telephone Company, a subsidiary of U.S. West, A.B.C. individually and D.E.F. as corporations, and other unnamed Co-conspirators,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

1. Whether petitioners have alleged a "pattern of racketeering activity" under RICO, 18 U.S.C. § 1961-68.

PARTIES TO THE PROCEEDING

The caption of the case in this Court contains the names of all parties to the proceeding in the Eighth Circuit (Supreme Court Rule 21.1(b)).

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OPINIONS BELOW

The opinion of the Eighth Circuit denying rehearing, dated October 23, 1987 is not officially reported. The full opinion, decided September 22, 1987 is officially reported at 829 F.2d 648 (8th Cir. 1987). The opinions of the district court filed November 24, 1986 and February 18, 1987 are officially reported at 648 F. Supp. 419 (D. Minn. 1986).

The Eighth Circuit opinion denying rehearing is reprinted in the Appendix, beginning at A-1. The full opinion, dated September 22, 1987 is reprinted in the Appendix beginning at A-4. The district court decisions filed November 24, 1986 and February 18, 1987 are reprinted in the Appendix at A-31 and A-11 respectively.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The judgment denying rehearing of the Court of Appeals for the Eighth Circuit was entered on October 23, 1987. The Petition for Certiorari was filed on January 20, 1988 and Certiorari was granted on March 21, 1988.

PROVISIONS OF STATUTE INVOLVED

18 U.S.C. § 1961. Definitions

As used in this chapter—

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, rob-

bery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year;

• • •

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

18 U.S.C. § 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interests in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase

do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

—o—

STATEMENT OF THE CASE

This is a putative class action arising under the Racketeering Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961-1968. Petitioners filed and served their Summons and Complaint on July 8, 1986. Petitioners' First Amended Complaint (Appendix I, P. 70) was filed and served on July 15, 1986. Petitioners alleged that Respondents committed acts in violation of 18 U.S.C. §§ 1962(a), (b), (c) and (d). In addition to federal claims, petitioners alleged state law violations pursuant to the court's pendant jurisdiction which consisted of acts of bribery in contravention of Minn. Stat. § 609.42, subd. 1(1) and (2) and common law bribery.

Oral arguments were heard in the district court on October 1, 1986. By order dated November 21, 1986, the court granted Respondent Northwestern Bell Telephone Company's (Northwestern Bell) motion to dismiss the Complaint in its entirety on the grounds that the Petitioners had failed to allege a "pattern" of racketeering activity and, on the 1962(a) count, the fact that there was no person/enterprise distinction. In addition, the court found that under the "filed rate" doctrine, Petitioners' cause of action was not federally cognizable.

Petitioners filed a motion to amend or reconsider on December 3, 1986 which the District Court denied on February 10, 1987. Petitioners appealed to the Eighth Circuit on March 20, 1987. Oral arguments were heard on September 2, 1987 and the Opinion was filed on September 22, 1987 affirming the trial court's dismissal of Petitioners' Complaint in that Petitioners had failed to allege a RICO pattern of racketeering activity. On October 23, 1987, Petitioners' petition for rehearing en banc, filed October 4, 1987 was denied. Petitioners filed their petition for certiorari on January 20, 1988. This Court granted the Writ on March 21, 1988.

Unlike many RICO claims, this case does not involve "garden variety" fraud allegations. Petitioners allege that from January 1, 1980 through the present Respondent Northwestern Bell conducted different acts of bribery directed at members of the Minnesota Public Utilities Commission who were sitting in their quasi-judicial function.[1]

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[1] Although Respondent will allege that Northwestern Bell has committed no wrongdoing, it should be noted that the Min-

(Continued on following page)

Payments of over one hundred thousand dollars were made to different commissioners through various methods by separate Northwestern Bell employees and agents. In one of these situations, payments were made through a middle man, and were hidden in the defendant's records as "attorney fees." In another ploy, employment negotiations took place with a sitting commissioner resulting in her receiving over $100,000.00 in "consulting fees" within a year after leaving the commission. In another scenario, parties, gifts, and a great number of meals were paid for by defendant for commissioners, the frequency of which rose dramatically during critical commission rate hearings.

The votes at the tainted hearings resulted in increases well beyond the amounts originally recommended by administrative law judges. Despite the pleading of these and other incidents of bribery, the District and Circuit Courts found that only one scheme to bribe the commissioners existed, and that more than one scheme was necessary for a pattern.

Plaintiffs seek to recover damages suffered by Plaintiffs and the class due to the improper rate increases. These illegal charges were the result of bribery, attempts to bribe, conspiracy and the racketeering activities alleged. Plaintiffs also seek, as a class, interest, reasonable attorneys fees, punitive and treble damages. Plaintiffs also applied for an injunction preventing Defendants from engaging in further illegal activity and other relief as the Court deems just and proper.

(Continued from previous page)

nesota Court of Appeals has already recognized the tainting of the quasi-judicial function of the MPUC by Respondent. See, *Matter of Public Utilities Commission*, 417 N.W.2d 274 (Minn. App. 1987). The tainted rate hearing is but one part of the activities considered in Petitioners' action.

SUMMARY OF ARGUMENT

Petitioners' RICO complaint was dismissed under the Eighth Circuit's multiple scheme pattern requirement. Petitioners are now before this Court requesting that the "multiple scheme" requirement be rejected and Petitioners' complaint reinstated.

Since *Sedima, S.P.R.L. v. Imrex Company, Inc.*, 473 U.S. 479, 496 (1985), the courts have been in chaos regarding application of the RICO pattern requirement. The Eighth Circuit has become the most restrictive by adopting a requirement that the pattern be formed with multiple schemes. This requirement is in conflict with the statutory language, the legislative history, and this Court's decision in *Sedima*. Furthermore, the Eighth Circuit restriction conflicts with other portions of the statute and the purposes and practical application of both criminal and civil RICO. Other circuits have overwhelmingly criticized and rejected the Eighth Circuit's position, but in adopting other, less restrictive standards, the circuits have failed to develop a unified definition, therefore causing a serious split in the circuits. Conflicting pattern requirements have led to an uneven application of RICO, placing RICO plaintiffs in the untennable position of having claims accepted or rejected based on the circuit in which they are brought.

Petitioners urge this Court to reject the pattern requirement as defined by the Eighth Circuit, and to reinstate Petitioners' Complaint by finding that the Petitioners have adequately alleged a pattern for RICO purposes. Petitioners also urge this Court to fashion a definition of the RICO pattern which will guide the circuit and district courts in review of future civil and criminal RICO complaints.

ARGUMENT

In order to establish a RICO cause of action, four elements must be proven. These elements are 1) conduct, 2) of an enterprise 3) through a pattern 4) of racketeering activity. *Sedima, S.P.R.L. v. Imrex Company, Inc.*, 473 U.S. 479, 496 (1985). Of these elements, at issue in the case at bar is whether petitioners' Complaint satisfies an essential element of the RICO cause of action by showing that the respondents engaged in a pattern of racketeering activity. The Eighth Circuit affirmed the trial court's dismissal of Petitioners' Complaint, finding that Petitioners had not sufficiently pleaded a pattern of racketeering activity. Petitioners request that this Court review the Eighth Circuit's "multiple scheme" pattern requirement and the dismissal of Petitioners' RICO Complaint. Petitioners allege that the Eighth Circuit's interpretation is contrary to the statutory language, the legislative history, and this Court's interpretation of the statute in *Sedima*. The Eighth Circuit's pattern definition should be rejected by this Court and the dismissal of Petitioners' Complaint should be reversed. This Court is also requested to develop a meaningful definition of the term "pattern" in a manner consistent with the statute, thereby ending the chaos that exists in the circuit courts regarding this issue.

I. The Eighth Circuit's interpretation of "pattern" should be rejected and the dismissal of Petitioners' Complaint reversed.

In a properly pleaded RICO complaint, a pattern of racketeering activity must be shown. Under 18 U.S.C. § 1961(5), a pattern "requires at least two acts of racketeering activity, one of which occurred after the effective

date of this chapter and the last of which occurred within 10 years . . . after the commission of a prior act of racketeering activity. . . ." This Court has not yet directly ruled on this portion of the RICO statute. The circuit and district courts however, have looked to *Sedima S.P.R.L. v. Imrex Company Inc.*, 473 U.S. 479 (1985) as a basis for interpreting the pattern requirement.

Sedima was not a case in which pattern was questioned; rather, *Sedima* addressed whether the plaintiff failed to allege an injury "by reason of" a violation of § 1962 and whether the complaint was defective in that it did not allege that the respondents had already been criminally convicted of the predicate acts of mail and wire fraud or of a separate RICO violation. This Court found that these artificial restrictions, instituted by the lower courts, could not be used to limit civil RICO's application. This Court specifically noted that the general principle surrounding the RICO statute is that it is to be read broadly. *Id.* at 497. "This is the lesson not only of Congress' self-consciously expansive language and overall approach, . . . but also of its expressed admonition that RICO is to 'be liberally construed to effectuate its remedial purposes.'" *Id.* at 497-98 (citations omitted). In discussing the issues in the case, this Court made a short reference to the pattern requirement. This Court in dicta stated:

> As many commentators have pointed out, the definition of a "pattern of racketeering activity" differs from the other provisions in § 1961 in that it states that a pattern "*requires* at least two acts of racketeering activity," § 1961(5) (emphasis added), not that it "means" two such acts. The implication is that while two acts are necessary, they may not be sufficient. Indeed, in common parlance two of anything do not generally form a "pattern". The legislative history supports the view that two isolated acts of racketeering activity do not constitute a pattern. As the Senate Report explained: "This target of [RICO] is thus not sporadic activity. This infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective. It is this factor of *continuity plus relationship* which combines to produce a pattern." S. Rep. No. 91-617, p. 158 (1969) (emphasis added).

Id. at 496, n. 14.

Rather than focusing on the policy statements contained in the text, the courts, and specifically the Eighth Circuit, have chosen to focus on the wording "continuity plus relationship" contained in footnote 14. In effect, this dicta has been seized upon by courts throughout the country to graft new restrictions upon the statute such as the Eighth Circuit's "multiple schemes" requirement.

The Eighth Circuit's restrictive definition of pattern was first announced in *Superior Oil Company v. Fulmer*, 785 F.2d 252 (8th Cir. 1986). *Superior Oil* dealt with the theft of gas from a pipeline over a period of time. The act of theft in *Superior Oil* was characterized as "one isolated fraudulent scheme" instead of one isolated fraudulent act. The gravamen of the Eighth Circuit's restriction is found in that use of the term "scheme". The actions of the defendants were characterized as comprising "one continuing scheme to convert gas from Superior Oil's pipeline. Tnere was no proof that Fulmer, Branch or Nichols had ever done these activities in the past and there was no proof that they were engaged in other criminal activities elsewhere." *Id.* at 257. This analysis was unfortunately used in subsequent cases and has led the

Eighth Circuit to a definition of pattern which includes the requirement of multiple schemes and criminal activity other than that relevant to the RICO case being brought. *See, Ornest v. Delaware North Cos.*, 818 F.2d 651 (8th Cir. 1987); *Holmberg v. Morrisette*, 800 F.2d 205, 210 (8th Cir. 1986), *cert. denied*, 107 S.Ct. 1953 (1987); *Deviries v. Prudential-Bache Securities, Inc.*, 805 F.2d 326 (8th Cir. 1986).

A review of the Eighth Circuit cases illustrates how this multiple scheme requirement is not only inconsistent with the statutory language, but has led to strained results as in this case. In the instant case numerous bribes were made, which, though related, were clearly separate; yet the court found only a single scheme existed, resulting in dismissal.

Similar tortured logic regarding the application of the "multiple scheme" requirement is revealed in *Madden v. Gluck*, 815 F.2d 1163 (8th Cir.), *cert. denied*, 108 S.Ct. 86 (1987), where the complaint alleged that the defendants engaged in a vast array of fraudulent activities by use of the mail and wire in violation of 18 U.S.C. § 1341 (mail fraud) and 18 U.S.C. § 1343 (wire fraud). The acts included a check kiting scheme where the defendants drew 5,643 checks totaling $4,264,038.66 on Landmark St. Louis Bank and where Landmark received a total of $93,708.92 in check fees, a diversion of another company's corporate assets including funds totaling $7,755.00 withheld from employees for taxes, union dues, health insurance and other contributions, and a defrauding of creditors by preparing and distributing false financial statements. *Id.* at 1164. The court found that although the acts were sufficiently

related to form a pattern they constituted "mere subdivisions of only one fraudulent scheme." *Id.*

In *Allright Missouri, Inc. v. Billeter*, 829 F.2d 631 (8th Cir. 1987), plaintiffs brought an action regarding several fraudulent activities in connection with the sale and operation of limited partnerships. Allright consisted of limited partners in Downtown Development Association, a limited partnership formed by defendants. Plaintiffs alleged that material misrepresentations and omissions of fact were made in the original sale of the partnerships and that subsequent conveyances of partnership assets were improper. Plaintiffs alleged the following acts: 1) mail and wire fraud in connection with the original sale of the limited partnership interests, 2) the wrongful sale of Downtown Development's property and wrongful acts associated with the sale, and 3) improper diversion of other partnership assets to defendants. *Id.* at 641. In spite of the existence of these three separate fraudulent activities, the Eighth Circuit affirmed the district court's finding of only one scheme. The court stated: "Allrights' allegations, if true, evince only a solitary scheme by Burkhardt and Senturia to wrongfully deprive the limited partners of their investment in the partnership." *Id.* The court also was not disuaded from the view that it was only one scheme even though the acts occurred over a period of four years and were directed at several individuals and entities comprising the limited partnership interest. *Id.* Indeed, since *Superior Oil* the Eighth Circuit has dismissed virtually every civil RICO claim. They have done so based on the multiple scheme restriction without regard to the number of victims involved, the number of acts, or

the length of time over which the acts extend. *See Ornest v. Delaware North Companies,* 818 F.2d 651, 652 (8th Cir. 1987) (defendant skimmed money from gross receipts on vending machines and falsified daily and monthly gross receipts submitted to plaintiffs over an eight year period; RICO pattern rejected); *Deviries v. Prudential-Bache Securities Inc.,* 805 F.2d 326, 329 (8th Cir. 1986) (fraudulent security sales over course of six years does not constitute RICO pattern).

At this point, the Eighth Circuit's pattern decisions are not only extremely restrictive but are also inconsistent. Compare *Superior Oil* with *United States v. Ellison,* 793 F.2d 942, 950 (8th Cir.), *cert. denied,* 107 S.Ct. 415 (1986) (two arsons constituted a pattern because they stem from the same or similar purposes, involve the same groups of participants and had similar methods of commission) and *Alexander Grant and Co. v. Tiffany Industries Inc.,* 742 F.2d 408 (8th Cir. 1985) (injury as a result of a pervasive scheme of mail and wire fraud designed by defendant to obtain a favorable audit).

The definition of pattern used by the Eighth Circuit under which the instant case was dismissed does not comport with the statutory language, the legislative history or the policy statements of this Court in *Sedima.* Practically speaking, it is an unworkable standard, and it creates constitutional problems regarding the criminal sanctions which are allowed by RICO, is at odds with implementation of other portions of the statute and has been criticized and rejected by other circuits. This Court should reject the Eighth Circuit's interpretation by reversing its decision in this case and reinstate Petitioners' Complaint.

A. The Eighth Circuit's "multiple scheme" requirement is in conflict with the RICO statute.

The RICO statute defines "pattern of racketeering activity" very simply. It only requires "at least two acts of racketeering activity" 18 U.S.C. § 1961(5) (1982), such as, as pleaded in the instant case, at least two acts of bribery. Nowhere does the statute refer to "schemes" or "episodes." This is acknowledged by the Eighth Circuit itself. In this case, Judge John R. Gibson expressed his view "that the multiple scheme requirement that we have grafted onto the pattern element strays from the statutory language of RICO." *H.J. Inc. v. Northwestern Bell,* 829 F.2d 648, 651 (8th Cir. 1987) (Gibson, J. concurring).

That this multiple scheme test is absent from the statutory language has been noted by other circuits. One of the most recent cases to discuss the Eighth Circuit's RICO pattern requirement is *Sun Savings and Loan Association v. Dierdorff,* 825 F.2d 187 (9th Cir. 1987). In discussing the positions taken by post *Sedima* courts, the *Dierdorff* court characterized the Eighth Circuit as holding that a series of predicate acts related to one fraudulent scheme or criminal episode would not constitute a pattern. *Id.* at 192, citing *Superior Oil Company, Inc. v. Fulmer,* 785 F.2d 252, 257 (8th Cir. 1986). *Dierdorff* stated "it is not necessary to show more than one fraudulent scheme or criminal episode to establish a pattern under *Sedima.*" *Id.* at 193. The court further noted that there is "no sound basis for the view taken by some courts that a pattern requires more than one 'fraudulent scheme' or 'criminal episode.'" *Id.* The *Dierdorff* court found that requiring a plaintiff to show that the predicate acts are somehow both related and again sufficiently unconnected

in time was not supported by the language in RICO itself: "requiring temporal unconnectedness, i.e., separate acts, makes sense, but neither RICO's language nor *Sedima's* interpretation of it supports the requirement of substantive unconnectedness, i.e., separate episodes or schemes." *Id.* (footnote omitted). The court further noted that the effects of requiring such a balance would only "forestall RICO claims that are legitimate under the RICO Act itself, its legislative history, and the Supreme Court's interpretation of the Act." *Id.* at 194.

The Second Circuit in *United States v. Ianniello*, 808 F.2d 184 (2nd Cir. 1986), *cert. denied*, 107 S.Ct. 3230 (1987) has also criticized the pattern requirement adopted by the Eighth Circuit. The *Ianniello* court cited *Superior Oil Company v. Fulmer* in discussing that the Eighth Circuit required as part of its definition of pattern, proof that the defendants engaged in more than one scheme. The Court concluded that "forcing such a result from the word 'pattern' is a strained and inappropriate reading of the statutory language." *Id.* at 192. The court also noted that the multiple scheme requirement was neither grounded in the statutory language of RICO nor was there any clear legislative history to indicate that, for example, because mail fraud is listed as a predicate act, it means only "scheme like fraud." *Id.* at n. 16. The court felt that imposing such an element "violates the Supreme Court's admonition against adding requirements not grounded in the statute or the legislative history." *Id.*

Similarly, the Third Circuit has also rejected the position that the RICO statute requires two distinct schemes. In *Barticheck v. Fidelity Union Bank/First National State*, 832 F.2d 36, 39 (3rd Cir. 1987), the court noted difficulties

with this type of interpretation. "First, 'scheme' is hardly a self defining term, and it appears nowhere in the RICO statute." *See also, Lawaetz v. Bank of Nova Scotia*, 653 F. Supp. 1278, 1286 (D. Virgin Islands 1987) (rejecting the Eighth Circuit's requirement for pattern as "legally unsupportable" stating that "RICO's language and legislative history are devoid of a multiple episode requirement.")

The multiple scheme requirement grafted onto the statute by the Eighth Circuit simply cannot be supported by the statutory language. To impose a reading on the statute contrary to its actual wording violates this Court's admonition against adding requirements not grounded in the statute. *See, United States v. Turkette*, 452 U.S. 576, 593 (1981). This is not the form of statutory amendment that is appropriately undertaken by the courts. *Sedima*, 473 U.S. at 500.

B. The Eighth Circuit's "multiple scheme" requirement is in conflict with the legislative history of the RICO statute.

In *Sedima*, this Court discussed the legislative history of the statute. Of note is the awareness that RICO was "an aggressive initiative to supplement old remedies to develop new methods for fighting crime." *Id.* at 498. The Court noted that it is in the spirit of this "aggressive initiative" that the acts must be interpreted. *Id.* Congress also wanted to reach through the RICO Act both "legitimate" and "illegitimate" enterprises. *Id.* at 497.

Sedima also specifically discussed the legislative history behind the "pattern of racketeering activity" requirement:

As many commentators have pointed out, the definition of a "pattern of racketeering activity" differs from the other provisions in § 1961 in that it states that a pattern "*requires* at least two acts of racketeering activity," § 1961(5) (emphasis added), not that it "means" two such acts. The implication is that while two acts are necessary, they may not be sufficient. Indeed, in common parlance two of anything do not generally form a "pattern". The legislative history supports the view that two isolated acts of racketeering activity do not constitute a pattern. As the Senate Report explained: "This target of [RICO] is thus not sporadic activity. This infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective. It is this factor of *continuity plus relationship* which combines to produce a pattern." S. Rep. No. 91-617, p. 158 (1969) (emphasis added). Similarly, the sponsor of the Senate bill, after quoting this portion of the Report, pointed out to his colleagues that "[t]he term 'pattern' itself requires the showing of a relationship. . . . So, therefore, proof of two acts of racketeering activity, without more, does not establish a pattern. . . ." 116 Cong.Rec. 18940 (1970) statement of Sen. McClellan). See also *id.* at 35193 (statement of Rep. Poff) (RICO) "not aimed at the isolated offender"); House Hearings, at 665. Significantly, in defining "pattern" in a later provision of the same bill, Congress was more enlightening: "criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." 18 U.S.C. § 3575(e). This language may be useful in interpreting other sections of the Act. Cf. *Iannelli v. United States*, 420 U.S. 770, 789 (1975).

Id. at 496, n. 14. Of note is that in the legislative history, the term "acts" is used: there is no reference to "scheme,"

"scheme-like activity" or multiple "episodes." The legislative history therefore does not support such an interpretation.

The failure of legislative history to support the Eighth Circuit's multiple scheme requirement has been noted by other courts. *See, Barticheck v. Fidelity Union Bank/First National State*, 832 F.2d 36, 39 (3rd Cir. 1987) ("even assuming one could adequately distinguish among multiple schemes, a rule requiring two or more schemes would exempt from RICO liability defendants who engage in a single unlawful scheme, however extensive and injurious. Such an outcome is plainly inconsistent with the purposes of the statute."); *United States v. Ianniello*, 808 F.2d 184, 192 n. 16 (2nd Cir. 1986), *cert. denied*, 107 S.Ct. 3230 (1987) ("Nor are we directed to any clear legislative history to indicate that when, for example, Congress listed mail fraud as an act, it meant only 'scheme-like' fraud.").

That the Eighth Circuit's "multiple-scheme" requirement is contrary to legislative history is well documented by the Senate discussions regarding the RICO bill. Senator Dole, in urging the adoption of the RICO bill, described the type of activity at which RICO would be aimed. He discussed a case involving a pattern of arson and murder against the A & P Tea Company in an unsuccessful effort to force A & P to sell a particular brand of detergent. 116 Cong. Rec. 36, 296 (1970). Although Congress obviously believed RICO would apply to such a situation, the "multiple-scheme" restriction would prevent a RICO action within the Eighth Circuit. Such a result is a repudiation of the legislative history.

In *Sedima*, this Court noted the expansiveness of the RICO statute given the plain wording of the statute in its

definition of pattern and the goals of the Congress in effectuating new ways to fight crime regarding "legitimate" and "illegitimate" businesses. 473 U.S. at 497-498. A reading of "multiple-scheme" into the statute is contrary to legislative intent. Therefore, the Eighth Circuit's multiple scheme requirement does not comport with the legislative history of the statute and should be rejected.

C. The Eighth Circuit's "multiple scheme" requirement is in conflict with the decision of Sedima.

The Eighth Circuit's multiple scheme requirement is contrary to the logical, statutory analysis in *Sedima*. In stating the reasons for *Sedima's* rejection of the restrictions placed on the statute by the lower court, this Court relied on the text of the statute. *Sedima* specifically rejected the requirement of a prior criminal conviction on the basis that "we can find no support in the statute's history, its language, or consideration of policy" for such a requirement. *Id.* at 493. Similarly, this Court, in rejecting the "racketeering injury" limitation stated: "A reading of the statute belies any such requirement." *Id.* at 495. This Court refused to judicially amend the statute. The implication of these holdings is that barriers to RICO claims which are not contained in the statutory language or history are not to be upheld. The Eighth Circuit's "multiplescheme" pattern requirement is a pure judicial creation with no foundation in the statute or history and should not be upheld.

The Eighth Circuit's "multiplescheme" requirement also places restrictions on RICO that are contrary to the specific language of *Sedima*. This Court noted that RICO is to be read broadly. *Id.* at 497. It noted that this lesson

is learned from "Congress' self-consciously expansive language and overall approach" as well as the express provision that "RICO is to be 'liberally construed to effectuate its remedial purposes.' " *Id.* at 497-98. *Sedima* observed that the statute's remedial purposes "are nowhere more evident than in the provisions of a private action for those injured by racketeering activity." *Id.* at 498. The Court also specifically stated that RICO was passed as an aggressive initiative to supplement old remedies and for the development of new methods in the fight against crime, and that it is within this "spirit" that all of the act's provisions should be read. *Id.* Allowing this multiple scheme restriction to stand is therefore contrary to the expansive reading that this Court has applied to the RICO act.

In *Bush Development Corporation v. Harbour Place Associates*, 632 F.Supp. 1359 (E.D.Va. 1986), the defendants urged the court to find no RICO pattern where there was only one scheme to defraud. The court rejected this argument noting that to do so would be to turn the "Supreme Court's reasoning on its head" and that the argument was out of line with the tenor of the remainder of the *Sedima* opinion:

> In short, the narrow reading of the pattern of racketeering requirement proposed by the defendant is, in principle, very similar to the criminal conviction and racketeering injury requirements that were rejected by this Court in *Sedima*. The source of these strained interpretations is the "extraordinary, if not outrageous uses to which civil RICO has been put," including its use in "everyday fraud cases". *Id.* at 3287. Nevertheless, the Supreme Court recognized that RICO's expansiveness reflects the statute's breadth,

> not its ambiguity and concluded that the statute's use against respected and legitimate enterprises was a direct result of the statute's language that could only be corrected by Congress. *Id.* at 3287.

Id. at 1366. It is ironic that *Sedima,* which struck down artificial limitations created by district courts trying to clear their dockets, has been itself used by courts to fashion new pattern limitations which likewise thwart the intent of RICO. To ignore the spirit of the *Sedima* decision and twist this Court's suggestion regarding "pattern" is to place baseless limitations on the statute. To accept the Eighth Circuit's "multiple scheme" requirement is, as the *Bush* court noted, "out of tenor" with the *Sedima* decision. This interpretation must be rejected.

D. The Eighth Circuit's "multiple scheme" requirement conflicts with other portions of the RICO statute.

The Eighth Circuit's "multiple scheme" restriction also conflicts with other portions of the RICO statute. This conflict is especially evident if the multiple scheme limitation of the Eighth Circuit is applied to § 1962(b), which deals with the takeover of an enterprise. A § 1962(b) count was pleaded in the instant case. Section 1962(b) states: "It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities which affect, interstate or foreign commerce."

This provision represents a major purpose of the RICO statute. *Russello v. United States,* 464 U.S. 16, 28 (1983); *United States v. Turkette,* 452 U.S. 576, 591 (1981).

Under the Eighth Circuit's test, no racketeering activity would be found where the acts are pursuant to a single scheme. Under § 1962(b), there is always a single scheme: that of taking over an enterprise. Section 1962(b) would then effectively be read out of the statute:

> This provision does not prohibit an enterprise which is committing predicate acts; rather it prohibits predicate acts which are aimed at taking over an enterprise. . . . It prohibits one scheme to acquire an interest in an interstate enterprise. To require two schemes as part of the *definition* of pattern under § 1961(5) would effectively eliminate this provision.

United States v. Ianniello, 808 F.2d 184, 192 (2nd Cir. 1986), *cert. denied,* 107 S.Ct. 3230 (1987) (footnote omitted).

Similarly, requiring a multiple scheme to create a pattern of racketeering activity potentially conflicts with § 1962(d) which is the conspiracy section of the RICO statute. This section was also pleaded in the instant case. § 1962(d) states that "[i]t shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section." A requirement of multiple schemes might defeat a single conspiracy charge and conversely, a showing of a single conspiracy may well preclude a finding of multiple schemes and thus a pattern. Such results would be untennable and clearly not within the contemplation of Congress.

E. The Eighth Circuit's "multiple scheme" requirement conflicts with the purposes and practical application of criminal and civil RICO.

In addition to civil penalties, RICO also authorizes criminal sanctions. RICO is considered to be the prosecutor's main weapons in organized crime, political corrup-

tion, white collar crime, and terrorism prosecutions. Oversight on civil RICO suits: *Hearings before the Senate Judiciary*, 99th Cong., 1st Sess. 106, 109-11 (1985) (testimony of Assistant Attorney General Steven Trott). Under the Eighth Circuit's pattern definition, however, prosecutors will face the probability that criminal RICO defendants will escape conviction. In the recent case of *United States v. Kragness*, 830 F.2d 842 (8th Cir. 1987), the defendants were tried on a thirteen count indictment. Count I alleged a RICO conspiracy charging that the defendants conspired to conduct or participate in the conduct of a drug enterprise's affairs through a pattern of racketeering activity. Count II charged the defendants with conducting or participating in the conduct of a drug enterprise's affairs through a pattern racketeering activity. The other counts involved conspiracy to import marijuana, conspiracy to distribute marijuana, conspiracy to import and distribute cocaine and quaaludes, traveling in interstate commerce to promote unlawful activity, possession with intent to distribute cocaine, using a telephone to facilitate marijuana exportations and distribution, interstate travel to promote marijuana exportation and distribution, transportation of Canadian currency to the United States without reporting it, and conspiracy to obstruct the Internal Revenue Service in the collection of taxes. *Id.* at 853. The court found that a pattern of racketeering activity did exist even under the Eighth Circuits restrictive view:

> Here we think it clear that even our more restrictive view of the pattern requirement has been met, for there is evidence of not two but three separate schemes: first, there was a scheme to import marijuana into La Junta; second, there was a cocaine-and-quaalude scheme; and third, there was a scheme to import marijuana into the Phoenix area.

Id. at 858. Thus, the *Kragness* court found liability under the RICO statute. However, it is clear that had there just been a scheme to import only one drug in La Junta, to import cocaine for example, these defendants would not have been subject to RICO liability despite numerous criminal acts over a long period of time, affecting many victims. No doubt, the multiple scheme restriction will limit the application of criminal RICO in the Eighth Circuit if not stricken.

This is even more clear in the context of the current case. The defendants here have not been criminally indicted. However, the Eighth Circuit has found that there was only one scheme—that of attempting to bribe the Minnesota Public Utilities Commission. Although Plaintiffs alleged numerous individual acts of bribery, if criminal indictments are ever returned in this case, none of the defendants would be subject to RICO criminal liability.

The results of the application of the multi-scheme restriction also create serious constitutional questions. 18 U.S.C. §§ 1962(a), (b), and (c) (1982) set out the conduct which constitutes either a civil or criminal RICO violation. Section 1962(d) prohibits a conspiracy to violate any of these provisions. Section 1961 contains the definitions which apply equally to civil and criminal actions. The statutory scheme of RICO therefore requires that the interpretation of pattern be identical in both a civil and criminal action. *See, Northern Securities Company v. United States*, 193 U.S. 197, 401 (1904) (Holms, J. dissenting) ("The words cannot be read one way in a suit

which is to end in fine and imprisonment and another way in one which seeks an injunction"). The civil and criminal portions of the RICO statute are subject to the constitutional standards regarding "vagueness". This means that the standards of conduct must be clear so that a person of ordinary intelligence is given fair notice "that his contemplated conduct is forbidden by statute." *United States v. Hariss,* 347 U.S. 612, 617 (1954). Allowing the courts the ability to theorize and interpret a set of facts to determine whether or not the acts committed by a potential RICO defendant are sufficient to be called "schemes" or "episodes" does not provide sufficient notice to a RICO defendant.

Despite the same statutory language applying to criminal and civil RICO, remarkably, virtually every Eighth Circuit civil RICO case post *Superior Oil* has been dismissed, yet every criminal RICO case upheld. Obviously this illustrates the true reason for the Eighth Circuit's multi-scheme restriction—an attempt to limit civil RICO cases. The Eighth Circuit applies this civil RICO limitation despite lack of support in the case law, the history, the *Sedima* decision, and despite the clear legal impropriety of applying the statute one way for criminal cases, and another for civil cases.

Some courts have interpreted the pattern requirement by requiring a showing that two related acts in connection with an enterprise satisfy the pattern requirement.. *See United States v. Ianniello,* 808 F.2d 184 (2nd Cir. 1986), *cert. denied,* 107 S.Ct. 3230 (1987); *R.A.G.S. Couture Inc. v. Hyatt,* 774 F.2d 1350 (5th Cir. 1985). Such an interpretation would alleviate the problem of notice because there

would be no doubt as to the requirements of RICO. *See, generally,* Bridwels and Cooper, *Hard Law and Bad Cases: The Fourth Circuit Limits Civil RICO,* 22 Wake Forest L. Rev. 715, 720-729 (1987). Under the multiple scheme test of the Eighth Circuit, it is unclear how many acts are needed, how long these acts must continue and for what purpose these acts are done. Serious questions of vagueness can then arise. *See Barticheck v. Fidelity Union Bank/First National State,* 832 F.2d 36, 39 (3rd Cir. 1987) (" 'scheme' is hardly a self-defining term"). The Eighth Circuit's restrictions should therefore be overruled.

The multiple scheme approach also raises other practical problems in conducting a lawsuit under RICO. The Eighth Circuit requires instances of other criminal activity to show a pattern for RICO purposes. *Superior Oil Co. v. Fulmer,* 785 F.2d 252, 257 (8th Cir. 1986). With such an approach, unless two separate schemes have been conducted, both causing the plaintiff injury, the plaintiff would be required to produce evidence regarding other unrelated schemes. This would require the plaintiff not only to have knowledge of schemes injuring others, but also to seek discovery beyond the acts affecting the plaintiff. The multiple scheme requirement places the plaintiff in the following dilemma: plaintiff is required to plead acts with specificity—yet how can a plaintiff specifically describe an act which did not involve the plaintiff? In addition, even if the plaintiff could generally describe a second act, unrelated to himself, there would be significant discovery problems when the plaintiff attempted to make inquiry into these acts which did not, in any way, injure the plaintiff.

This issue is addressed in the context of standing in *Louisiana Power and Light Company v. United Gas Pipe Line,* 642 F. Supp. 781 (E.D. La. 1986). The *Louisiana Power* court felt that the interpretation of the statute posed by *Superior Oil* was clearly wrong. The court criticized the requirement of multiple criminal schemes because a defendant who committed a series of acts in furtherance of a single criminal scheme could not be sued for RICO damages. *Id.* at 808. The court also stated:

> The problem I find in these cases is that to require the plaintiff to prove multiple schemes narrows the reach of the statute too far. The *Fulmer* case would require a plaintiff to prove that the defendant had defrauded or intended to defraud not only the plaintiff but others as well. *Fulmer,* at 257. But surely the plaintiff would not have standing to investigate or raise the issue of criminal activities which injure others. Such conduct neither damages nor threatens the plaintiff, and so, is simply not relevant to the plaintiff's suit. And if the plaintiff has no standing to raise the issue, it will never be able to make out a RICO claim under *Fulmer,* because it will never have the opportunity to prove the defendant's criminal injury of third parties. I refuse to place the RICO plaintiff in such a Catch 22.

Id. at 808-9. Indeed, this situation has been analogized to applying a "one bite rule" to RICO situations where a defendant has committed a singular fraud on a series of victims. Bridwell and Cooper, *Hard Law and Bad Cases: The Fourth Circuit Limits Civil RICO,* 22 Wake Forest L. Rev. 715, 731 (1987).

F. The Eighth Circuit's "multiple scheme" requirement has been subjected to wide-spread criticism by other circuits and lower courts.

The First, Second, Third, Fourth, Seventh, Ninth, and Eleventh Circuits have specifically rejected the Eighth Circuit's "multiple scheme" test. District Courts from the Fifth and D.C. Circuits have followed suit. These courts criticize the Eighth Circuit pattern restriction because it is in conflict with *Sedima,* statutory language, legislative history, and the results are contrary to the goals of the statute. *Roeder v. Alpha Industries Inc.,* 814 F.2d 22, 31 (1st Cir. 1987) ("We decline to adopt a definition of pattern that relies solely on whether activity can be classified as a single scheme or episode."); *Barticheck v. Fidelity Union Bank/First National State,* 832 F.2d 36, 39 (3rd Cir. 1987) (Rejecting the position that a RICO pattern must involve at least two distinct schemes in that it would exempt those who engage in only one unlawful scheme which is contrary to the purpose of this statute); *International Data Bank Ltd. v. Zepkin,* 812 F.2d 149, 155 (4th Cir. 1987) ("the 'one continuing scheme' test enunciated in . . . [Fulmer] will not always hold true."); *Sun Savings and Loan Association v. Dierdorff,* 825 F.2d 187, 193 (9th Cir. 1987) ("It is not necessary to show more than one fraudulent scheme or criminal episode to establish a pattern under *Sedima.*"); *United States v. Ianniello,* 808 F.2d 184, 192 (2nd Cir. 1986), *cert. denied,* 107 S.Ct. 3230 (1987) ("We conclude that forcing such a result from the word 'pattern' is a strained inappropriate reading of the statutory language."). *Morgan v. Bank of Waukegan,* 804 F.2d 970, 975 (7th Cir. 1986) ("The proposition that the predicate acts must always occur as part of separate

schemes in order to satisfy the continuity aspect of the pattern requirement focuses excessively on continuity, and therefore cannot be accepted as a general rule."); *Bank of America National Trust and Savings Association v. Touche Ross and Company,* 782 F.2d 966, 971 (11th Cir. 1986) ("Acts that are part of the same scheme or transaction can qualify as distinct predicate acts"). *See, also, United States v. Madeoy,* 652 F. Supp. 371, 379 (D.DC. 1987) (a single conspiracy or scheme may also constitute a pattern of racketeering activity); *Louisiana Power and Light v. United Gas Pipeline,* 642 F. Supp. 781, 808 (E.D. La. 1986) ("The reading of the statute proposed by *Inryco* and *Fulmer* is clearly wrong").

In rejecting the Eighth Circuit's approach to pattern, the courts have proposed alternative definitions of pattern. The Seventh Circuit has developed a definition of pattern which is both closer to the words and intent of RICO than the Eighth Circuit. The Seventh Circuit has rejected the view that the predicate acts must always occur as part of separate schemes in order to satisfy the continuity aspect of the pattern requirement as put forth under *Sedima. Morgan v. Bank of Waukegan,* 804 F.2d 970, 975 (7th Cir. 1986). The *Morgan* court chose a "middle course" in finding that a pattern is continuous if the predicate acts are ongoing over a period of time so that they can be viewed as constituing "separate transactions." *Id.* The *Morgan* court indicated that the relevant factors include the number and variety of the predicate acts alleged, the number of victims of the alleged activity, the length of time of the activity, the presence of separate schemes, and the occurrence of distinct injuries. *Id.* The court was aware however that the fact that the predicate acts involved the same victim or were related to an overall

scheme did not mean that the pattern requirement had not been met. This approach has been accepted by district courts in the Third Circuit. *Lawaetz v. Bank of Nova Scotia,* 653 F. Supp. 1278, 1287 (D. Virgin Islands 1987).

The Court of Appeals for the Third Circuit has taken a similar approach, noting that the presence of a pattern under RICO "does not turn on the abstract characterization of racketeering acts as 'continuous' and 'related', but rather on a combination of specific factors . . ." *Barticheck v. Fidelity Union Bank/First National State,* 832 F.2d 36, 38-39 (3rd Cir. 1987). These factors include the number of unlawful acts committed, the length of time during which these acts occurred, the character of the activity, the numbers of victims and perpetrators and the similarity of the acts. *Id.* These factors are applied on a case by case basis. *Marshall-Silver Construction Co., Inc. v. Mendel,* 835 F.2d 63, 66 (3rd Cir. 1987).

The approach of examining each RICO claim on a case by case basis and weighing the relevant factors appears promising. Indeed, it appears to be somewhat similar to the definition in *Sedima* where the Court recognized that under 18 U.S.C. § 3575(e) a pattern is formed "if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." 473 U.S. at 496, n. 14. This specific approach has recently been used in the D.C. Circuit. In *Yellow Bus Lines, Inc. v. Local Union 639,* 839 F.2d 782 (D.C. Cir. 1988), the court took note that four predicate acts were alleged under a 1962(c) RICO claim. In finding that a pattern existed, the court observed that Congress provided a definition of pattern

in the RICO bill under 18 U.S.C. § 3575(e) (1982). In *Yellow Bus,* the plaintiffs alleged that defendants engaged in acts of vandalism and intimidation with a "unitary goal." 839 F.2d at 789. The court stated: "We believe this scenario meets the statutory requirements for a 'pattern of racketeering activity.'" *Id.*

The Second Circuit has refused to stray from RICO's statutory language in both their pre and post-*Sedima* cases. *See, United States v. Ianniello,* 808 F.2d 184, 192 (2nd Cir. 1986), *cert. denied,* 107 S.Ct. 3230 (1987); *United States v. Weisman,* 624 F.2d 1118 (2nd Cir.), *cert. denied,* 449 U.S. 871 (1980). In *Ianniello,* the court held that when a person commits at least two acts that have a common purpose of furthering or continuing a criminal enterprise and that person is associated with that enterprise, the elements of relatedness and continuity in *Sedima* are satisfied for purposes of pattern. 808 F.2d at 192. The court found that relatedness is supplied by the concept of "enterprise," which is defined in § 1962(c) of the statute. Relatedness is also supplied by the ten year requirement of § 1961(5). *Id.* at 190. Because the predicate acts which form the pattern of racketeering activity must all be performed in the conduct of the affairs of an enterprise, the link between the acts is satisfied. Therefore, the necessary element of continuity is also satisfied since the enterprise is a continuing operation. *Id.* The court discussed its interpretation in terms of *Sedima's* suggestion of relatedness and continuity:

> As discussed above, we believe that the inquiry as to relatedness and continuity is best addressed in the context of the concept of "enterprise" expressed in § 1962(c), and to a lesser extent, the ten year requirement of § 1961(5). An enterprise is a "group of persons associated together for a common purpose of engaging in a course of conduct" and "is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit." *United States v. Turkette,* 452 U.S. 576, 583, 101 S.Ct. 2524, 2528, 69 L. Ed. 2d 246 (1981). This Circuit requires that, under § 1962(c), the enterprise be a continuing operation and that the acts be related to a common purpose. See *Moss v. Morgan Stanley Inc.,* 719 F.2d 5, 21-22 (2d Cir. 1983, cert denied, 465 U.S. 1025, 104 S.Ct. 1280, 79 L. Ed. 2d 684 (1984); *United States v. Mazzei,* 700 F.2d 85, 89 (2d Cir.), cert denied, 461 U.S. 945, 103 S.Ct. 2124, 77 L. Ed. 2d 1304 (1983). This result derives from the language of § 1962(c), which requires that the pattern of predicate acts be done in the conduct of the affairs of the enterprise. See *Weisman,* 624 F.2d at 1122.
>
> *Id.* at 191. The *Ianniello* court went on to hold that when "a person commits at least two acts which have the purpose of furthering the continuing enterprise with which the person is associated, the elements of relatedness and continuity which *Sedima* requires to satisfy § 1962(c) are met." *Id.* at 192.

Under any of these circuits' definitions of pattern it is clear that the instant case would survive. The majority of the circuits have rejected the Eighth Circuit's analysis. The Eighth Circuit should be reversed and Petitioners' Complaint reinstated.

II. This Court should develop a meaningful approach to the definition of "pattern."

Petitioners believe they have, in Section I above, fully shown this Court that the Eighth Circuit's "multiple scheme" restriction must be rejected. However, so as to

avoid the continuation of the conflict which exists in the remaining circuits, Petitioners call upon this Court to settle the controversy. Although this Court has, in *Sedima*, called upon the lower courts to "develop a meaningful concept of 'pattern.'" 473 U.S. at 500, it is now clear that the gap between the circuits is so wide that only this Court can bridge it by fashioning a meaningful approach to that definition.

In creating a definition, this Court should first begin with the statutory language, bearing in mind that it must be liberally construed. *Id.* at 498. Therefore, the definition of pattern should be sufficiently broad to effect RICO's remedial purpose. *Id.* It is clear that at a minimum, two acts as defined in § 1961 are required.

However, in addition to the statutory language, legislative history must be reviewed. This history specifically points to additional considerations—those of "relationship plus continuity." *Id.* at 496, n.14. Courts have erred by focusing on one aspect of the action, such as the racketeering acts, without looking at the whole factual situation in relationship to the statute as a whole. As this Court implied in *Sedima*, this narrow focus on just one element is inappropriate. *See, Id.* ("[W]hile two acts are necessary, they may not be sufficient.") It is consistent with the legislative history and the text of the statute to find that "continuity plus relationship" can be found by looking at the racketeering acts and the activity prohibited under § 1962(a), (b), (c) or (d), and/or the relationship of the acts to the enterprise and/or the acts and the nature of the enterprise itself. In other words, it is only through an examination of the total factual context of each case that a finder of fact can determine whether a

pattern of racketeering activity exists. The factual context approach for examining whether a pattern exists becomes even more important because the nature of the pattern changes depending upon which subsection of the act is alleged. For example, § 1962(b) prohibits a person from engaging in a pattern of racketeering activity to take control of an enterprise. It is clear under 1962(b) that the activity must be related to gaining any interest or control. The nature of the activity suggests continuity in that acts are required to take over the enterprise and continual acts are required to keep that interest or control. Therefore, if, as in the instant case, Respondent bribed two individuals for the purpose of controlling the Public Utilities Commission, a RICO action will stand. The two acts are directy related through the prohibited activity and the enterprise. This demonstrates the "continuity plus relationship" as discussed in the legislative history.

However, if a person bribes a member of a corporation with the purpose of taking control of that corporation and also commits the act of arson for the sole purpose of defrauding an insurer, no 1962(b) RICO action would lie. The two acts, although satisfying the definition of "racketeering activity" have no connection in a 1962(b) case; they are not related to prohibited activity and/or the enterprise; they are indeed "isolated incidents".

One can see how the definition of pattern changes according to the subsection pleaded. The above facts, although not satisfying a 1962(b) RICO action, may well form a pattern for a 1962(c) action. One must consider, for example, were the acts of arson and bribery committed by people conducting an ongoing enterprise? Did the acts

constitute regular enterprise activity? The pattern issue can only be resolved when examined in this fashion. To formulate a hard and fast legal rule is an impossibility, for the rule cannot apply equally in each of the subsections. Indeed, such an approach—a factual context approach—was suggested in 18 U.S.C. § 3575(e), as quoted in footnote 14 of *Sedima*. If the Court chooses to include the various factors from 18 U.S.C. § 3575(e) or the various factors laid out by the Seventh Circuit in *Morgan*, or the Third Circuit in *Barticheck*, it should note that these considerations only illustrate the type of factors which must be used for determining pattern.

Finally, continuity must be looked at in terms of the ongoingness of the activity when it is occuring rather than at its end when the activity has been discovered. *Barticheck v. Fidelity Union Bank/First National State*, 832 F.2d 36, 39 (3rd Cir. 1987) (rejecting the requirement of open-endedness, stating such an interpretation "would deny a RICO cause of action in a case where the scheme had fully accomplished its goal."); *Liquid Air Corp. v. Rogers*, 834 F.2d 1297, 1308-09 (7th Cir. 1987) ("Continuity refers instead to the duration of the predicate acts"); *Sun Savings and Loan Association v. Dierdorff*, 825 F.2d 187, 194 n.5 (9th Cir. 1987) ("As long as a threat of continuing activity exists at some point during the racketeering activity, the continuity requirement is satisfied.").

———o———

CONCLUSION

Under the pattern of racketeering activity standard as suggested above, it is clear that Petitioners have properly pleaded violations of the Racketeer Influenced and Corrupt Organizations Act (RICO). It is also clear that under any test used by any circuit other than the Eighth Circuit, Petitioners have likewise properly alleged a "pattern of racketeering activity." For the foregoing reasons, the Eighth Circuit should be reversed and Petitioners' Complaint reinstated.

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In The

Supreme Court of the United States

October Term, 1987

N.J. Ric., a Minnesota corporation, Kirk Dahl, Larry Kragen and Mary Kragen, individually and d/b/a Fiesta Images, Susan Davis, Robert Neal, Janet E. Wiest, Richard L. Anderson, Thomas J. Matt, and all others similarly situated,

Petitioners,

vs.

Northwestern Bell Telephone Company, a subsidiary of U.S. West, A.B.C. individually and D.E.F. as corporations, and other unnamed Co-conspirators,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

Whether petitioners' first amended complaint fails to allege a "pattern of racketeering activity" within the meaning of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968.

PARTIES TO THE PROCEEDING

The caption of the case contains the names of petitioners. Respondent Northwestern Bell Telephone Company is a wholly-owned subsidiary of U.S. West Communications, Inc., which in turn is a wholly-owned subsidiary of U.S. West, Inc. Respondent Northwestern Bell Telephone Company itself has no subsidiary or affiliated corporations.

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No. 87-1252

In The

Supreme Court of the United States

October Term, 1987

H.J. Inc., a Minnesota corporation, Kirk Dahl, Larry Krugen and Mary Krugen, individually and d/b/a Photo Images, Susan Davis, Robert Neal, Isaac H. Ward, Richard L. Anderson, Thomas J. Mott, and all others similarly situated,

Petitioners,

vs.

Northwestern Bell Telephone Company, a subsidiary of U.S. West, A.B.C. individually and D.E.F. as corporations, and other unnamed Co-conspirators,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF RESPONDENT

OPINIONS BELOW

The United States Court of Appeals for the Eighth Circuit entered its order denying rehearing en banc on October 23, 1987, *see* 829 F.2d 648 (8th Cir. 1987), and that order is reprinted in the Appendix at page 4. The Court of Appeals' opinion dated September 22, 1987, affirming

the District Court's dismissal of petitioners' claims, is reported at 829 F.2d 648 (8th Cir. 1987), and is reprinted in the Appendix beginning at page 5.

The memorandum and order of the United States District Court for the District of Minnesota dated February 18, 1987, denying petitioners' motion for reconsideration, is reported at 653 F. Supp. 908 (D. Minn. 1987), and is reprinted in the Appendix beginning at page 11. The District Court's memorandum and order dated November 24, 1986, granting respondent's motion to dismiss, is reported at 648 F. Supp. 419 (D. Minn. 1986), and is reprinted in the Appendix beginning at page 31.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The order of the Court of Appeals denying rehearing en banc was entered on October 23, 1987. The petition for a writ of certiorari was filed on January 20, 1988, and the petition was granted on March 21, 1988.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 1961. Definitions

As used in this chapter–

(1) "racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and

punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2320 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement

from union funds), (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States, or (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act;

* * *

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity; . . . .

18 U.S.C. § 1962. Prohibited activites

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of

assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or [sic] racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

18 U.S.C. § 1964. Civil remedies

* * *

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee. . . . .

STATEMENT OF THE CASE

This action was commenced in July 1986 on behalf of a putative plaintiff class of all Minnesota purchasers of "telecommunications goods and services" from respondent Northwestern Bell Telephone Company ("Northwestern Bell") between 1980 and 1986. Petitioners alleged that Northwestern Bell had engaged in dealings with certain members of the Minnesota Public Utilities Commission ("the MPUC" or "the Commission") that constituted bribery in violation of the Minnesota criminal bribery statute, Minn. Stat. § 609.42 (1986).[1] They claimed a right of action for damages on account of this alleged activity both directly under the Minnesota statute and on the theory that, because of the alleged bribery, Northwestern Bell had violated several provisions of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968. In a single allegation applicable to all legal theories, petitioners averred that the supposed violations injured all members of the alleged class and that the rates each of them was required to pay for Northwestern Bell's services pursuant to orders of the MPUC exceeded the rates that were "fair and reasonable"; in essence, petitioners sought to have the trial court determine what were "fair and reasonable" rates and award them as damages their payments in excess of those court-determined rates.

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[1] In February 1987, a state grand jury sitting in Ramsey County, Minnesota, heard evidence concerning Northwestern Bell's actions relating to the MPUC and decided to return no indictments in connection therewith. *See* Minneapolis Star Tribune, Feb. 26, 1987, at 1A, 9A. *See also* note 6, *infra*.

Petitioners' first amended complaint (¶ 30) stated that Northwestern Bell "has attempted to, or did offer, gave or promised to give, directly or indirectly, to the public officials who were duly appointed commissioners of the Public Utilities Commission, benefits, rewards, and consideration, to which they were not legally entitled, with the intent to influence such officers with respect to the performance of their powers and duties as such officers of said commission." Appendix at 75. The supposed instances of such activity by Northwestern Bell were set forth in paragraphs 31 through 42 of the first amended complaint, and each such instance was utilized as a purported predicate act of bribery for purposes of petitioners' RICO claims under 18 U.S.C. §§ 1962(a)-(d) alleged in counts II through V.[2] Appendix at 75-81.

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[2] In count II of their first amended complaint, petitioners asserted a violation of 18 U.S.C. § 1962(a), averring that Northwestern Bell "has received income derived directly or indirectly through a pattern of racketeering activity involving at least two acts of bribery under Minn. Stat. § 609.42, subd. 1(1) and (2)" and that "[t]he predicate acts of bribery are referred to in paragraphs 29 through 42 of this complaint" (¶¶ 50-51). Appendix at 78. Count III of petitioners' first amended complaint claimed a violation of 18 U.S.C. § 1962(b), alleging that Northwestern Bell and others "engaged in a pattern of racketeering activity consisting of at least two acts which involve bribery under Minn. Stat. § 609.42, subd. 1(1) and (2)," through which pattern of racketeering activity they "acquired or maintained, directly or indirectly, interest or control of the Public Utilities Commission" and that "[t]he predicate acts of bribery are referred to in paragraphs 29 through 42 [of this complaint]" (¶¶ 58-60). Appendix at 79-80. In count IV of their first amended complaint, petitioners pled a violation of 18 U.S.C. § 1962(c), contending that Northwestern Bell and others

(Continued on following page)

Among the claimed acts were entertainment of several commissioners on various occasions (¶¶ 32-36, 42); free transportation to one commissioner on one occasion (¶ 31); and discussions with two commissioners during their membership on the MPUC that eventually led to their employment by Northwestern Bell after they left the Commission and payments to them for services rendered during said employment (¶¶ 37-42). Appendix at 75-77. Petitioners asserted injury in their business or property pursuant to 18 U.S.C. § 1964(c) on the basis that "the compensation Northwestern Bell was allowed to receive by the [MPUC] was in excess of what would be fair and reasonable charges to [petitioners] and members of the class, and that said unfair and unreasonable compensation was caused by the involvement in bribery, attempts to bribe, conspiracy and racketeering activities alleged in [the first amended] complaint" (¶ 75). Appendix at 81.

Northwestern Bell filed an answer denying that it had violated any law in its dealings with the MPUC. Appendix at 59. It then moved to dismiss all or various

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(Continued from previous page)

"conducted and participated directly or indirectly in the conduct and affairs of the enterprise [the MPUC] through a pattern of racketeering activity consisting of at least two acts of bribery" and that "[t]he predicate acts of bribery are referred to in paragraphs 29 through 42 [of this complaint]" (¶¶ 68-69). Appendix at 80. Count V of petitioners' first amended complaint alleged a violation of 18 U.S.C. § 1962(d) on the basis that Northwestern Bell and others supposedly "conspired together to violate the provisions of 18 U.S.C. § 1962(a), (b) and (c)" (¶ 73). Appendix at 81. Thus, the element of a "pattern of racketeering activity" was indispensable to all of petitioners' RICO claims.

parts of petitioners' first amended complaint on a number of different grounds.

By memorandum and order filed November 24, 1986, the District Court granted respondent's motion. The District Court ruled on only three of the numerous grounds for dismissal urged by Northwestern Bell.[3] It held: (1) that the averments of the first amended complaint failed to state a "pattern of racketeering activity" under RICO; (2) that petitioners' allegations under section 1962(a) of RICO failed to state a claim, in that Northwestern Bell was alleged to be both the "person" and the "enterprise" under that section; and (3) that, even if petitioners had adequately alleged violations of RICO, their claims under the statute were barred by the "filed rate" doctrine, because they sought to have the trial court establish that the "reasonable" rates for respondent's services were something other than the rates promulgated by the MPUC. 648 F. Supp. 419 (D. Minn. 1986); Appendix at 31.

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[3] Grounds for dismissal advanced by Northwestern Bell but not adjudicated by the District Court included, *inter alia*, the contentions that the MPUC is not an "enterprise" within the meaning of 18 U.S.C. §§ 1962(b) and (c); that Northwestern Bell does not have the necessary "interest in or control of" the MPUC within the meaning of section 1962(b); and that Northwestern Bell is not "employed by or associated with" the MPUC within the meaning of section 1962(c). Northwestern Bell also argued to the District Court that petitioners' effort to revise telephone rates collaterally, if not barred altogether by the "filed rate" doctrine, at least raised factual issues within the primary jurisdiction of the MPUC, and that this action should be dismissed or stayed pending the MPUC's exercise of its jurisdiction.

Accordingly, the District Court dismissed petitioners' RICO claims with prejudice.[4]

Petitioners made a timely motion pursuant to Rule 59(e) of the Federal Rules of Civil Procedure to "alter or amend" (*i.e.*, reconsider) the judgment of dismissal. The District Court denied that motion by memorandum and order dated February 18, 1987. 653 F. Supp. 908 (D. Minn. 1987); Appendix at 11.[5]

Petitioners then appealed to the United States Court of Appeals for the Eighth Circuit. On September 22, 1987, the Court of Appeals filed its opinion affirming the District Court based on petitioners' failure to allege a RICO "pattern of racketeering activity." The Court of Appeals did not consider the alternate bases for dismissal relied upon by the District Court. 829 F.2d 648 (8th Cir. 1987); Appendix at 5. On October 23, 1987, petitioners' petition for rehearing en banc was denied by the Court of Appeals. 829 F.2d 648 (8th Cir. 1987); Appendix at 4.

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[4] The District Court declined to exercise pendent jurisdiction over petitioners' claim for alleged violation of the Minnesota bribery statute, which it dismissed without prejudice. 648 F. Supp. at 429-430; Appendix at 54-55.

[5] Petitioners did not seek leave to replead their RICO allegations when they moved for reconsideration of the District Court's judgment of dismissal. After their suit was dismissed, petitioners filed a virtually identical action in state court, again making no material revision in their RICO claims. This action likewise was dismissed by the trial court, and that dismissal was affirmed by the Minnesota Court of Appeals on March 15, 1988. *H.J. Inc. v. Northwestern Bell Corp.*, 420 N.W.2d 673 (Minn. App. 1988). The Minnesota Supreme Court thereafter denied petitioners' request for further review. No. CX-87-1843 (Minn. May 16, 1988).

Petitioners sought a writ of certiorari from this Court on January 20, 1988, and their petition was granted on March 21, 1988. ___ U.S. ___, 99 L. Ed. 2d 420 (1988).

Because this action was disposed of on the pleadings in the District Court, their is no factual record. As the Court of Appeals recognized, of course, because petitioners' first amended complaint was dismissed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, the facts alleged in that complaint must be viewed "in the light most favorable to them." 829 F.2d at 649; Appendix at 6. However, Northwestern Bell emphatically denies any illegality in its dealings with the MPUC and is confident that, if this action were ever brought to trial, petitioners' allegations would be shown to be factually as well as legally groundless.[6]

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[6] Petitioners erroneously imply that Northwestern Bell has been found guilty in a related proceeding of the wrongdoing alleged in their first amended complaint. *See* Brief of Petitioners at 4 n.1. The action referred to by petitioners, *In re Minnesota Public Utilities Comm'n*, 417 N.W.2d 274 (Minn. App. 1987), affirmed a finding of the MPUC that Northwestern Bell's *ex parte* contacts with commissioners gave the appearance of procedural impropriety with respect to one of the Commission's decisions. The instant first amended complaint avers criminal bribery, a much different charge which Northwestern Bell vehemently disclaims and which no court or other body has ever upheld. On the contrary, the MPUC itself, in investigating such charges, found no basis to conclude that there had been criminal wrongdoing; indeed, the Commission found no evidence even of procedural impropriety with respect to several other proceedings. *See* Order of the MPUC After Investigation, Docket No. U-999/CI-86-177 (April 2, 1987). Moreover, as has been noted, a grand jury that probed this matter voted not to return any indictments. *See* note 1, *supra*.

SUMMARY OF ARGUMENT

The place to begin resolution of the question presented in this case is with the ordinary meaning of the statutory term "pattern." In common, contemporary usage, "pattern" implies consistency, frequency, typicality, and widespread design. The legislative history of "pattern" as used in the RICO Act reinforces a construction compatible with plain meaning by emphasizing the "factor of continuity plus relationship which combines to produce a pattern." S. Rep. No. 617, 91st Cong., 1st Sess. 158 (1969). Therefore, a RICO "pattern of racketeering activity" encompasses only continuous and related criminal acts that connote characteristic, persistent, and systematic wrongdoing of extensive proportion.

Using varying approaches, many of the courts of appeals have attempted to establish a "pattern" standard based on "continuity plus relationship." The United States Court of Appeals for the Eighth Circuit has required a showing of multiple criminal schemes to satisfy RICO's "pattern" element, and various other courts of appeals have exhibited reluctance to find a "pattern" where only one illicit scheme is alleged. Nevertheless, some of those courts have not made multiple schemes a singularly dispositive criterion, but have also looked to other factors to resolve the "pattern" issue, including: the character of the purported unlawful activity; the variety, number, and duration of the alleged predicate acts; the number of claimed victims and perpetrators; the occurrence of separate episodes or transactions giving rise to distinct injuries from predicate acts having independent harmful significance; the regularity of the asserted

unlawful conduct; and the existence of an ongoing criminal enterprise to which the averred illicit activity relates. The fundamental goal of the courts of appeals which have seriously grappled with the concept of "pattern" in the aftermath of this Court's decision in *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985), has been to bring the RICO Act in its civil applications back to the foundation of Congressional intent, and it is against the various standards which they have devised to effectuate the "continuity plus relationship" test that petitioners' RICO claims must be assessed.

The courts below correctly concluded that petitioners' RICO allegations do not manifest "continuity plus relationship" and thus fail to state a "pattern of racketeering activity." The Eighth Circuit's multiple-schemes condition, which fully comports with the ordinary meaning and legislative history of "pattern" and affords a bright-line measure of "pattern" averments, has not been met by petitioners, as the District Court determined and the Court of Appeals agreed. Moreover, even if this Court were to find it necessary to expand the scope of the inquiry into "continuity plus relationship" in order to consider more than the aspect of multiple schemes, analysis of the other potentially relevant factors identified by the courts confirms that a "pattern of racketeering activity" is absent here. As the District Court held, petitioners' "allegations do not fit the RICO paradigm" (653 F. Supp. at 915-916; Appendix at 27), and petitioners' assertion that they have properly pled a "pattern" under any test other than that of the Eighth Circuit is erroneous. *See* Brief of Petitioners at 35.

Unlike the prior criminal conviction and racketeering injury requirements rejected by this Court in *Sedima*, at issue here is a wholly appropriate limitation on the RICO Act, compelled by the statutory language and grounded in the legislative history, which is essential to prevent the statute's abuse. As this Court has recognized, a "meaningful" construction of "pattern" is central to rectifying the "increasing divergence" of RICO's utilization in its private civil version from Congressional intent. *Sedima, S.P.R.L. v. Imrex Co., supra,* 473 U.S. at 500.

Formulations of RICO's "pattern" requirement suggested by petitioners and certain amici miss the mark in that they speak only to the facet of "relationship" while disregarding the component of "continuity." However, as the legislative history makes clear, "[i]t is this factor of *continuity plus relationship* which *combines* to produce a pattern" (S. Rep. No. 617, *supra,* at 158 (emphasis added)), and it is only through inclusion of the "continuity" attribute that "pattern of racketeering activity" can be harmonized with its plain meaning. A "pattern" within the purview of RICO must be evaluated in the factual context of each case and framed in terms of multiple schemes, as well perhaps as the other indicia which the courts have identified as signifying "continuity plus relationship" and which thus aid the "pattern" inquiry. Such a particularized, multi-consideration approach seems best suited to ensure the presence of "continuity plus relationship" and thus properly to limit the statute as contemplated by Congress. Such a preferred approach leads to the inescapable conclusion that petitioners have failed to aver an adequate "pattern of racketeering activity" within the meaning of the RICO Act. Accordingly,

the judgment of the Eighth Circuit upholding the dismissal of petitioners' RICO claims should be affirmed.

ARGUMENT

I. RICO'S "Pattern" Requirement Must Be Construed In Terms Of "Continuity Plus Relationship" In Accord With Ordinary Meaning And Legislative Intent

As always, " 'the starting point in every case involving construction of a statute is the language itself.' " *Kelly v. Robinson,* 479 U.S. 36, __, 93 L. Ed. 2d 216, 224-225 (1986), *quoting Blue Chip Stamps v. Manor Drug Stores,* 421 U.S. 723, 756 (1975); *accord United States v. Hohri,* 482 U.S. ___, ___, 96 L. Ed. 2d 51, 58 (1987). Indeed, "[a] fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Perrin v. United States,* 444 U.S. 37, 42 (1979); *accord Burns v. Alcala,* 420 U.S. 575, 580-581 (1975). Therefore, the proper place to begin analysis of the issue presented in this case is with the ordinary meaning of the term "pattern."

The apposite definition of the word "pattern" in The Random House Dictionary of the English Language 1423 (2d ed., unabridged, 1987) is "a combination of . . . acts . . . forming a consistent or characteristic arrangement." Webster's Ninth New Collegiate Dictionary 864 (1983) defines "pattern" as "frequent or widespread incidence" and as "a discernible coherent system based on the

intended interrelationship of component parts." Similarly, "pattern" is defined in Webster's New International Dictionary of the English Language 1794 (2d ed., unabridged, 1943) as "in a series of events, an arrangement of parts, elements, or details that suggests a design or orderly distribution." *See also* Black's Law Dictionary 1015 (5th ed. 1979) ("pattern" defined as a "reliable sample of traits, acts or other observable features characterizing an individual"); Webster's New World Dictionary 1042 (2d College ed. 1980) ("pattern" defined as "something representing a class or type . . . a regular, mainly unvarying way of acting or doing"). Thus, in contemporary usage, a "pattern" is manifested through consistency, frequency, typicality, and widespread design. As this Court observed in *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 n.14 (1985), "in common parlance two of anything do not generally form a 'pattern.' "

Of course, it is "assume[d] 'that the legislative purpose is expressed by the ordinary meaning of the words used' " in a statute. *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982), *quoting Richards v. United States*, 369 U.S. 1, 9 (1962); *accord Kosak v. United States*, 465 U.S. 848, 853 (1984). " 'Absent a clearly expressed legislative intention to the contrary,' the statutory 'language must ordinarily be regarded as conclusive.' " *American Bank & Trust Co. v. Dallas County*, 463 U.S. 855, 862 (1983), *quoting Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). With regard to the term "pattern" as used in the RICO Act, the legislative history supports an interpretation commensurate with common meaning.

Title 18 U.S.C. § 1961(5) provides that a " 'pattern of racketeering activity' requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity." In *Sedima S.P.R.L. v. Imrex Co., supra,* 473 U.S. at 496 n.14, this Court commented on the legislative history relevant to construction of section 1961(5) as follows:

> "As many commentators have pointed out, the definition of a 'pattern of racketeering activity' differs from the other provisions in § 1961 in that it states that a pattern '*requires* at least two acts of racketeering activity,' § 1961(5) (emphasis added), not that it 'means' two such acts. The implication is that while two acts are necessary, they may not be sufficient. Indeed, in common parlance two of anything do not generally form a 'pattern.' The legislative history supports the view that two isolated acts of racketeering activity do not constitute a pattern. As the Senate Report explained: 'The target of [RICO] is thus not sporadic activity. The infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective. It is this factor of *continuity plus relationship* which combines to produce a pattern.' S. Rep. No. 91-617, p. 158 (1969) (emphasis added). Similarly, the sponsor of the Senate bill, after quoting this portion of the Report, pointed out to his colleagues that '[t]he term 'pattern' itself requires the showing of a relationship. . . . So, therefore, proof of two acts of racketeering activity, without more, does not establish a pattern. . . .' 116 Cong. Rec. 18940 (1970) (statement of Sen. McClellan). *See also id.*, at 35193 (statement of Rep. Poff) (RICO 'not aimed at the isolated offender'); House Hearings, at 665. . . ."

See also McClellan, *The Organized Crime Act (S. 30) or its Critics: Which Threatens Civil Liberties*, 46 Notre Dame Law. 55, 144 (1970) ("commission of two or more acts of racketeering activity is made a necessary, but not a sufficient, element of a pattern under title IX").

The concept of "continuity plus relationship which combines to produce a pattern" as expressed in the Senate Report conforms with the ordinary meaning of "pattern." As Ronald L. Gainer, Deputy Chief of the Legislation and Special Projects Section of the Criminal Division of the Department of Justice, explained during hearings on S. 30, which ultimately became the RICO Act, "[t]he Senate committee in its report . . . resolved any question but that a continuity and relationship must be shown in order to establish a pattern . . . "; he emphasized that the bill "says 'pattern,' and pattern has to be construed with its normal meaning." *Organized Crime Control: Hearings on S. 30 and Related Proposals Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 91st Cong., 2d Sess. 665 (1970). Not surprisingly, the Department of Justice applies such a limitation on "pattern" for purposes of criminal RICO prosecutions, stating in its RICO Guidelines for the Criminal Division that "[n]o indictment shall be brought charging a violation of 18 U.S.C. § 1962(c) based upon a pattern of racketeering activity growing out of a single criminal episode or transaction. . . . The purpose of this guideline is to prevent a pattern of racketeering activity being charged which *lacks the attributes which Congress had in mind* . . . ." 10 Department of Justice Manual, Title 9, §§ 9-110.340 and 9-110.341 (Prentice Hall 1988 Supp.) (emphasis added). *See also RICO Reform Legislation: Hearings on H.R. 2517, H.R. 2943,*

H.R. 4892, H.R. 5290, H.R. 5391, and H.R. 5445 Before Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 99th Cong., 1st and 2d Sess. 296 (1985 and 1986) (statement of John C. Keeney, Deputy Assistant Attorney General, Criminal Division, Department of Justice) (the "practice [of plaintiffs bringing private civil RICO suits on the basis of only one criminal episode] is common enough to warrant concern that the purpose of the statute's 'pattern' requirement – to limit RICO to ongoing criminal activity – is not being fully realized").

The structure and purpose of the RICO Act were aptly summarized in the Civil RICO Report of the American Bar Association:

"In an attempt to ensure the constitutionality of the statute, Congress made the central proscription of the statute the use of a 'pattern of racketeering activities' in connection with an 'enterprise,' rather than merely outlawing membership in the Mafia, La Cosa Nostra, or other organized criminal syndicates. 'Racketeering' was defined to embrace a potpourri of federal and state criminal offenses deemed to be the type of criminal activities frequently engaged in by mobsters, racketeers, and other traditional members of 'organized crime.' The 'pattern' element of the statute was designed to limit its application to planned, ongoing, continuing crime as opposed to sporadic, unrelated, isolated criminal episodes. The 'enterprise' element, when coupled with the 'pattern' requirement, was intended by the Congress to keep the reach of RICO focused directly on traditional organized crime and comparable ongoing criminal activities carried out in a structured, organized environment. The reach of the statute beyond traditional mobster and racketeer activity and comparable ongoing structured criminal enterprises, was intended to be incidental, and only to the extent necessary to

maintain the constitutionality of a statute aimed primarily at organized crime."

Report of the Ad Hoc Civil RICO Task Force of the ABA Section of Corporation, Banking and Business Law at 71-72 (1985) (footnote omitted); *see also Sedima, S.P.R.L. v. Imrex Co., supra*, 473 U.S. at 527 (dissent of Powell, J.) (expressing agreement with the view "argue[d] persuasively" in the ABA Report, and observing that "[t]he definition of 'pattern' may thus logically be interpreted as meaning that the presence of the predicate acts is only the beginning: something more is required for a 'pattern' to be proved"); 116 Cong. Rec. 18940 (remarks of Sen. McClellan) ("Title IX[ ] . . . lists offenses committed by organized crime with substantial frequency, as part of its commercial operations. . . . Unless an individual not only commits such a crime but engages in a pattern of such violations, and uses that pattern to obtain or operate an interest in an interstate business, he is not made subject to proceedings under title IX."). RICO's "pattern" element, which the Senate Report (No. 617, 91st Cong., 1st Sess. 158 (1969)) described as "essential to the operation of the statute," clearly encompasses only continuous and related criminal activities that connote characteristic, persistent, and systematic wrongdoing of widespread design, as both the ordinary meaning of the term and relevant legislative history demonstrate.[7]

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[7] As amici curiae Attorneys General of the States of Arizona, California, *et al.* acknowledge, "RICO's text . . . limits, but does not define 'pattern' " since the statute in section 1961(5) "requires at least two acts of racketeering activity" to constitute a "pattern" but does not provide that a "pattern" means two such acts. Brief of Amici Curiae States Attorneys

(Continued on following page)

II. Courts Of Appeals, Using Varying Approaches, Properly Have Attempted To Establish A "Pattern" Standard Based On "Continuity Plus Relationship"

In accord with the limiting focus of the RICO "pattern" requirement and especially in the aftermath of this Court's decision in *Sedima*, the courts of appeals have

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General at 9; *accord* Brief of Amicus Curiae Trial Lawyers for Public Justice at 16 ("RICO does not define 'pattern' "). Because this crucial "pattern" element is left undefined, the statute is subject to constitutional attack on vagueness grounds. As this Court held in *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972) (footnotes omitted):

> "Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application."

See, e.g., Lanzetta v. New Jersey, 306 U.S. 451, 452-453, 458 (1939) (striking down a New Jersey statute proscribing membership in a "gang" as "vague" and thus "repugnant to the due process clause of the Fourteenth Amendment" where "gang" was defined only as "consisting of two or more persons"). Only by implying the "factor of continuity plus relationship" from the ordinary meaning of "pattern" and the legislative history of the statute's "pattern" requirement can the RICO Act provide an ascertainable standard and even arguably meet a vagueness challenge.

struggled to articulate a standard for determining whether particular factual allegations present a "pattern of racketeering activity." Although the approaches taken by the courts to this difficult problem have differed somewhat, most of the circuits have faithfully concentrated on fashioning a test of "pattern" that meets the Congressional mandate of "continuity plus relationship."

The United States Court of Appeals for the Eighth Circuit has developed a "pattern" criterion, which it applied in the instant case to dismiss petitioners' claims, that embraces the "factor of continuity plus relationship" by requiring averment of acts arising out of more than one criminal scheme. This criterion originated in *Superior Oil Co. v. Fulmer*, 785 F.2d 252, 257 (8th Cir. 1986), wherein the Eighth Circuit held that multiple predicate acts of mail and wire fraud arising out of a single scheme did not satisfy RICO's "pattern" requirement:

> "Superior Oil has . . . failed to prove the 'continuity' sufficient to form a 'pattern of racketeering activity.' The actions of [the defendants] comprise one continuing scheme to convert gas from Superior Oil's pipeline. There was no proof that [the defendants] had ever done these activities in the past and there was no proof that they were engaged in other criminal activities elsewhere. . . . Instead, the record reveals one isolated fraudulent scheme. On the facts of this case, we agree with the court's conclusion in *Northern Trust Bank/O'Hare, N.A. v. Inryco, Inc.*, 615 F. Supp. 828, 832 (N.D. Ill. 1985), that '[i]t is difficult to see how the threat of continuing activity stressed in the Senate Report could be established by a single criminal episode. . . . It places a real strain on the language to speak of a single fraudulent effort, implemented by several fraudulent acts, as a 'pattern of racketeering activity.' "

Accord Deviries v. Prudential-Bache Securities, Inc., 805 F.2d 326, 329 (8th Cir. 1986) (allegations of fraudulent securities sales over the course of six years in the form of churning and misrepresentations in connection with one account did not state a "pattern"); *Holmberg v. Morrisette*, 800 F.2d 205, 210 (8th Cir. 1986), *cert. denied*, ___ U.S. ___, 95 L. Ed. 2d 526 (1987) (the "continuity" necessary to form a "pattern of racketeering activity" was not shown by multiple predicate acts of wire and mail fraud in furtherance of one scheme to draw down letters of credit securing the defendant's transactions with one of its customers); *but cf. United States v. Kragness*, 830 F.2d 842, 858 (8th Cir. 1987) (RICO'S "pattern" element was satisfied by evidence of three separate schemes – a scheme to import marijuana into La Junta, a second scheme involving cocaine and quaaludes, and a third scheme to import marijuana into the Phoenix area). The Eighth Circuit thus has sought to ensure the presence of "continuity plus relationship" combining to form a RICO "pattern" by making the existence of multiple illicit schemes dispositive.

The United States Court of Appeals for the Tenth Circuit has taken an approach substantially identical to that of the Eighth Circuit, refusing to find a "pattern" where "the single scheme at issue involved one victim . . . and had a single goal" since "[a] scheme to achieve a single discrete objective does not in and of itself create a threat of ongoing activity, even when that goal is pursued by multiple illegal acts, because the scheme ends when the purpose is accomplished" and thus "continuity" is not adequately shown. *Torwest DBC, Inc. v. Dick*, 810 F.2d 925, 928-929 (10th Cir. 1987); *accord Garbade v.*

Great Divide Mining & Milling Corp., 831 F.2d 212, 214 (10th Cir. 1987) (finding the absence of "continuity," and hence no "pattern," where multiple secret withdrawals from corporate funds were pled, because there was only a "single objective" for such acts); *Condict v. Condict*, 826 F.2d 923 (10th Cir. 1987) (allegations of fraud, deceit, and misrepresentation, and use of the mails and wires more than twice in connection therewith, arising from a dispute over a family ranching operation failed to state a "pattern of racketeering activity" under RICO because of the absence of "continuity").

Similarly, the United States Court of Appeals for the Fourth Circuit, while concluding that "no mechanical test can determine the existence of a RICO pattern" and that "[w]hat constitutes a RICO pattern is thus a matter of criminal dimension and degree," has held that a complaint by investors alleging as predicate acts violations of the securities laws with respect to a sale of securities did not properly aver a "pattern of racketeering activity"; the court reasoned that a "single, limited fraudulent scheme . . . is not of itself sufficient to satisfy § 1961(5)" because the "element of continuity" is missing and that "[t]o allow a 'pattern of racketeering' to flow from a single, limited scheme . . . would undermine Congress's intent that RICO serve as a weapon against ongoing unlawful activities whose scope and persistence pose a special threat to social well-being." *International Data Bank, Ltd. v. Zepkin*, 812 F.2d 149, 154-155 (4th Cir. 1987); *accord Eastern Publishing & Advertising, Inc. v. Chesapeake Publishing & Advertising, Inc.*, 831 F.2d 488, 492 (4th Cir. 1987), *petition for cert. filed*, 56 U.S.L.W. 3667 (No. 87-1530 Feb. 17, 1988) ("a single, non-recurring scheme to defraud

a single entity by taking unfair competitive advantage," allegedly carried out through predicate acts of mail and wire fraud, did not establish a RICO "pattern" because it was found "wanting in the required degree of continuity of conduct"); *HMK Corp. v. Walsey*, 828 F.2d 1071 (4th Cir. 1987), *cert. denied*, ___ U.S. ___, 98 L. Ed. 2d 657 (1988) (RICO allegations against a developer involving mail fraud, wire fraud, and extortion spanning more than four years in the context of obtaining government permits and zoning approvals were held not to state a "pattern of racketeering activity").

The United States Court of Appeals for the Second Circuit has taken a somewhat different tack. After initially holding that, "when a person commits at least two acts that have the common purpose of furthering a continuing criminal enterprise with which that person is associated," the "pattern" element of RICO is satisfied, *United States v. Ianniello*, 808 F.2d 184, 192 (2d Cir. 1986), *cert. denied*, ___ U.S. ___, 97 L. Ed. 2d 736 (1987), the Second Circuit has since upheld the dismissal of several RICO complaints on the ground that the alleged RICO "enterprise" lacked requisite continuity. *See, e.g., Creative Bath Products, Inc. v. Connecticut General Life Ins. Co.*, 837 F.2d 561, 563-564 (2d Cir. 1988); *Albany Ins. Co. v. Esses*, 831 F.2d 41, 44 (2d Cir. 1987); *Furman v. Cirrito*, 828 F.2d 898, 902-903 (2d Cir. 1987); *Beck v. Manufacturers Hanover Trust Co.*, 820 F.2d 46, 51-52 (2d Cir. 1987), *cert. denied*, ___ U.S. ___, 98 L. Ed. 2d 650 (1988). Most recently, however, the Second Circuit has revisited the RICO "pattern" issue, and, in finding the absence of a "pattern" in *Beauford v. Helmsley*, 843 F.2d 103, 110 (2d Cir. 1988) (Oakes, J.), *reh'g*

en banc granted (No. 87-7216 April 1, 1988), has delineated its position:

> "Essentially, then, the court has come some distance from *Ianniello*. Although . . . we speak in terms of 'enterprise' rather than 'pattern,' we nonetheless require continuity in any event, and find insufficient evidence of continuity in a single criminal episode regardless of how many fraudulent acts it entails. In other words, a single criminal episode or scheme does not charge a claim under RICO because it lacks sufficient continuity to constitute an enterprise, even if its fraudulent acts constitute a pattern. . . . [W]e must decide whether a discrete, even if widespread, and a continuing even if finite, scheme is sufficient to permit a plaintiff to take advantage of RICO. We hold that it is not."

The United States Court of Appeals for the Seventh Circuit also has stressed "continuity plus relationship" in analyzing RICO "pattern" questions. In *Medical Emergency Service Associates v. Foulke*, 844 F.2d 391, 395 (7th Cir. 1988) (citations omitted), the Seventh Circuit opined that "the existence of a 'pattern' as required by RICO must not focus excessively on either continuity or relationship, but rather must take into account both elements," and that "in order for the predicate acts to be sufficiently continuous to amount to a pattern of racketeering activity, 'the predicate acts must be ongoing over an identified period of time so that they can fairly be viewed as constituting separate transactions, *i.e.* "transactions somewhat separated in time and place." ' " In *Jones v. Lampe*, 845 F.2d 755, 757 (7th Cir. 1988) (citations omitted), the Seventh Circuit described its approach to the "pattern" requirement as follows:

> "Whether a RICO 'pattern' exists is clearly 'a fact-specific question encompassing many relevant factors,' including: (1) the number and variety of predicate acts and the length of time over which they were committed; (2) the number of victims; (3) the presence of separate schemes; and (4) the occurrence of distinct injuries. None of these factors is controlling standing alone, yet together, they provide the lens through which the courts may focus on the existence of 'continuity plus relationship.' "

Application of these principles has caused the Seventh Circuit to reject RICO claims in a number of cases arising out of a single scheme allegedly furthered by multiple predicate acts. *See, e.g., Jones v. Lampe, supra*, 845 F.2d at 758-759; *Medical Emergency Serv. Assocs. v. Foulke, supra*, 844 F.2d at 396-398; *Tellis v. United States Fidelity & Guaranty Co.*, 826 F.2d 477, 479-480 (7th Cir. 1987); *Skycom Corp. v. Telstar Corp.*, 813 F.2d 810, 818 (7th Cir. 1987); *Marks v. Pannell Kerr Forster*, 811 F.2d 1108, 1112 (7th Cir. 1987); *Elliott v. Chicago Motor Club Ins.*, 809 F.2d 347, 350 (7th Cir. 1986); *Lipin Enterprises Inc. v. Lee*, 803 F.2d 322, 323-324 (7th Cir. 1986). And even on "rare occasions" when the Seventh Circuit has recognized that " 'the mere fact that the predicate acts relate to only one overall scheme does not mean that the acts automatically fail to satisfy the pattern requirement,' " the existence of a "pattern" has rested on the independent harmful significance of the predicate acts. *Jones v. Lampe, supra*, 845 F.2d at 758, *quoting Appley v. West*, 832 F.2d 1021, 1027-1028 (7th Cir. 1987) (finding a "pattern" where two predicate acts of mail fraud in furtherance of one scheme caused separate injuries in that they involved two distinct conversions of funds); *see also Liquid Air Corp. v. Rogers*, 834 F.2d 1297, 1304-1305 (7th Cir. 1987), *petition for cert. filed*,

56 U.S.L.W. 3531 (No. 87-1262 Jan. 28, 1988) (a "pattern" was stated where nineteen separate acts of mail and wire fraud pursuant to a single scheme each caused a distinct injury so as to inflict repeated economic harm on the victim); *Morgan v. Bank of Waukegan*, 804 F.2d 970, 976 (7th Cir. 1986) (the "pattern" element was sufficiently asserted where separate acts of mail fraud over a period of several years relating to different events and thus causing distinct injuries were pled).

Like the Seventh Circuit, the United States Court of Appeals for the Third Circuit considers various factors in measuring whether RICO "pattern" allegations meet the "continuity plus relationship" test. In *Barticheck v. Fidelity Union Bank/First National State*, 832 F.2d 36, 40 (3d Cir. 1987), the Third Circuit stated:

> "We read the legislative history's reference to 'continuity' as simply calling for an inquiry into the extent of the racketeering activity. Although temporal open-endedness may be one measure of extent, it is not the only one. We decline to adopt a verbal formula for determining when unlawful activity is sufficiently extensive to be 'continuous.' This determination necessarily depends on the circumstances of the particular case."

Elaborating on its "pattern" analysis in *Marshall-Silver Construction Co. v. Mendel*, 835 F.2d 63, 66-67 (3d Cir. 1987), *petition for cert. filed*, 56 U.S.L.W. 3592 (No. 87-1358 Feb. 12, 1988) (citations omitted), the Third Circuit noted that the "[f]actors relevant to the case-by-case analysis to which we referred in *Barticheck* include, but are not limited to, 'the number of unlawful acts, the length of time over which the acts were committed, the similarity of the acts, the number of victims, the number of perpetrators,

and the character of the unlawful activity,' " and that "[t]he target of the RICO statute, as its name suggests, is criminal activity that, because of its organization, duration, and objectives poses, or during its existence posed, a threat of a series of injuries over a significant period of time." Employment of these considerations led the Third Circuit to hold in *Marshall-Silver Construction* that no "pattern" was shown on averments of a single, limited scheme with a single injury caused by only two perpetrators. *Id.* at 67.

The "pattern" issue also has been examined by the United States Court of Appeals for the First Circuit in *Roeder v. Alpha Industries, Inc.*, 814 F.2d 22, 30-31 (1st Cir. 1987) (citations omitted), in which it held:

> "Racketeering acts . . . do not constitute a pattern simply because they number two or more. The constituent elements must be sufficiently related to one another and threaten to be more than an isolated occurence. . . . We decline to adopt a definition of pattern that relies solely on whether activity can be classified as a single scheme or episode. . . . [G]iven the indeterminate nature of the statutory language, and the subtleties inherent in looking for 'continuity plus relationship,' no one characteristic can be considered as controlling in determining whether a pattern exists. In attempting to identify the order of magnitude at which acts constitute a pattern, the courts recognize that acts can be so closely interrelated in function and connected in time that the 'threat of [a] continuing activity' factor is absent. A bribe, which by any realistic appraisal is solitary and isolated, is not transformed into the threatening 'pattern of racketeering activity' with which Congress was concerned simply because the bribe is implemented in several steps and involves a number of

> acts of communication. . . . We hold that the bribery . . . did not constitute 'a pattern of racketeering activity.' "

In *Sedima, S.P.R.L. v. Imrex Co., supra,* 473 U.S. at 500, this Court acknowledged that, "in its private civil version, RICO is evolving into something quite different from the original conception of its enactors," and that "[t]he 'extraordinary' uses to which civil RICO has been put appear to be primarily the result of the breadth of the predicate offenses . . . and the failure of Congress and the courts to develop a meaningful concept of 'pattern.' " Many of the courts of appeals have responded to the challenge issued in *Sedima* by attempting to formulate a "pattern" standard founded on "continuity plus relationship."[8] Notwithstanding differences in approach, the fundamental goal has been to return the civil applications of the RICO Act to the mooring of Congressional intent, and it is against the pertinent standards devised to effectuate the "continuity plus relationship" test that petitioners' RICO allegations must be assessed.

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[8] In marked contrast to such laudable efforts to constrain RICO's "pattern" element in the wake of *Sedima*, the United States Court of Appeals for the Fifth Circuit, in *R.A.G.S. Couture, Inc. v. Hyatt*, 774 F.2d 1350, 1355 (5th Cir. 1985), has rejected the argument that two mere related acts of mail fraud are insufficient to constitute a "pattern." *But see Montesano v. Seafirst Commercial Corp.*, 818 F.2d 423, 426 (5th Cir. 1987) (urging that the *R.A.G.S. Couture* decision "be overturned en banc"). Similarly, the United States Court of Appeals for the Eleventh Circuit has held that "[a]cts that are part of the same scheme or transaction can qualify as distinct predicate acts" so as to comprise a "pattern of racketeering activity." *Bank of America v. Touche Ross & Co.*, 782 F.2d 966, 971 (11th Cir. 1986).

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III. As The Courts Below Correctly Concluded, Petitioners' RICO Allegations Do Not Manifest "Continuity Plus Relationship" And Thus Fail To State A "Pattern Of Racketeering Activity"

Engagement in multiple illicit schemes, each furthered by sufficiently numerous, related predicate acts of racketeering activity, would in most instances conclusively establish the element of "continuity" essential to the finding of a RICO "pattern." Therefore, the Eighth Circuit's demand that multiple schemes be shown in order to satisfy RICO's "pattern of racketeering activity" requirement fully comports with the ordinary meaning and the legislative history of the statutory term "pattern."

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The United States Court of Appeals for the Ninth Circuit also has refused this Court's invitation to "develop a meaningful concept of 'pattern' " and has concluded simply that "two or more acts of racketeering activity" can make up a "pattern," reasoning that "RICO defines 'pattern of racketeering activity' without mentioning continuity. There is no suggestion that the underlying illegal acts must be part of different criminal episodes. The dictum in *Sedima* is suggestive, but without additional explication by the Supreme Court we decline to follow its lead." *California Architectural Bldg. Prods., Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1469 (9th Cir. 1987), *cert. denied*, ___ U.S. ___, 98 L. Ed. 2d 650 (1988) (citations omitted). And the United States Court of Appeals for the District of Columbia Circuit has ruled that acts engaged in "during a specific time period in pursuit of a unitary goal . . . meet[ ] the statutory requirements for a 'pattern of racketeering activity.' " *Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639*, 839 F.2d 782, 789 (D.C. Cir. 1988). These courts essentially have eschewed the command of Congress that a RICO "pattern of racketeering activity" be demonstrated by *both* "relationship" *and* "continuity."

It is clear that petitioners have not alleged multiple schemes. In essence, petitioners' first amended complaint averred that Northwestern Bell provided inducements to certain members of the MPUC so as to influence the Commission's action and enable Northwestern Bell to overcharge consumers of telephone services in the State of Minnesota. All of the purported predicate acts of "racketeering activity" in which Northwestern Bell supposedly engaged were substantively of the same nature and for the same purpose. Fairly read, petitioners' first amended complaint contended that Northwestern Bell participated in a single scheme or episode involving multiple acts of "bribery" with a common objective, resulting in petitioners' claimed injury. The courts below refused to compartmentalize and segregate the alleged predicate acts artificially in order to manufacture a "pattern of racketeering activity." As the District Court persuasively reasoned:

> "Here, [petitioners'] amended complaint includes no allegations of separate transactions – merely separate predicate acts – and no allegations that these predicate acts have independent harmful significance. Each of the predicate acts alleged by [petitioners] was committed in furtherance of a single scheme to influence MPUC commissioners to the detriment of Northwestern Bell's ratepayers. . . . [Petitioners] simply have not alleged that [respondents] have engaged in like activities in the past or that they are engaged in other criminal activities elsewhere."

653 F. Supp. at 914; Appendix at 23-24. The Eighth Circuit appropriately concurred in this conclusion. 829 F.2d at 650; Appendix at 8 (petitioners' "complaint alleges no more that a series of fraudulent acts 'committed in furtherance of a single scheme to influence MPUC commissioners . . . ' ").

Although the Eight Circuit's multiple-schemes criterion has the considerable advantage of affording a bright-line test by which to evaluate RICO "pattern" averments, it has drawn criticism for being unduly restrictive in its application as the sole dispositive measure of "continuity plus relationship." Yet, even if this Court were to expand the scope of the inquiry into "continuity plus relationship" in order to encompass more than the aspect of multiple schemes, analysis of other potentially relevant factors likewise supports the determination that a "pattern of racketeering activity" is absent here. Such fact-specific additional considerations as the character of the purported unlawful activity; the variety, number, and duration of the alleged predicate acts; the number of claimed victims and perpretrators; the occurrence of separate episodes or transactions giving rise to distinct injuries from predicate acts having independent harmful significance; the regularity of the asserted unlawful conduct; and the existence of an ongoing criminal enterprise to which the averred illicit activity relates, have been designated by the courts, including the Seventh Circuit, the Third Circuit, and the Second Circuit, as apposite to identification of "continuity plus relationship" and thus to resolution of the RICO "pattern" issue. *See, e.g., Jones v. Lampe, supra,* 845 F.2d at 757; *Marshall-Silver Construction Co. v. Mendel, supra,* 835 F.2d at 66-67; *United States v. Ianniello, supra,* 808 F.2d at 192; *Lipin Enterprises Inc. v. Lee, supra,* 803 F.2d at 324. Scrutiny of such considerations in the context of this case only further confirms that petitioners have failed to state a "pattern of racketeering activity" within the meaning of the RICO Act.

Petitioners' first amended complaint concerned one alleged corporate perpetrator – Northwestern Bell; one type of purported illegal activity – bribery; one claimed target entity – the MPUC; one supposed central objective – obtaining remuneration in excess of "fair and reasonable" charges; and one unitary, identifiable group of alleged victims – Northwestern Bell's Minnesota ratepayers. Northwestern Bell's purported conduct as pled by petitioners was not aimed at various claimed "victims" or "targets," but, rather, dealt only with the MPUC and had only alleged indirect impact on its ratepayers as a collective body. *See, e.g., Satellite Financial Planning Corp. v. First Nat'l Bank of Wilmington*, 646 F. Supp. 118, 120 (D. Del. 1986) (noting that " 'the repetition of an act taken against a single victim or set of victims . . . suggests no expansion, no ongoing design, no continuity such as was the target of Congress in RICO' ").

Moreover, the nature of the predicate acts averred by petitioners can be summarized as instances of entertainment of certain members of the MPUC, provision of free air transportation for one commissioner on one occasion, and premature negotiation of employment terms with two commissioners. *See* First Amended Complaint ¶¶ 31-42; Appendix at 75-77. This supposed conduct by Northwestern Bell hardly epitomizes the serious "racketeering activity" that RICO was designed to eradicate. *See, e.g.*, S. Rep. No. 617, *supra*, at 41 ("gambling, narcotics, loan sharking, or other illegal businesses"); 116 Cong. Rec. 586 (1970) (remarks of Sen. McClellan) ("syndicated gambling, the importation . . . and distribution of narcotics, and loan sharking"); *id.* at 591 (remarks of Sen. McClellan) (narcotics, loan sharking, prostitution, and bootlegging); *id.* at 601 (remarks of Sen. Hruska) ("robbery, larceny, and arson"); *id.* at 36296 (remarks of Sen.

Dole) ("arson and murder" in the context of attempts to compel the purchase of product from a mob-controlled business); Report of the Ad Hoc Civil RICO Task Force of the ABA Section of Corporation, Banking and Business Law, *supra*, at 72 (the statute is intended to reach "traditional mobster and racketeer activity and comparable ongoing structured criminal enterprises"); *cf. United States v. Turkette*, 452 U.S. 576, 579 (1981) (involving " 'a group of individuals associated in fact for the purpose of illegally trafficking in narcotics and other dangerous drugs, committing arsons, utilizing the United States mails to defraud insurance companies, bribing and attempting to bribe local police officers, and corruptly influencing and attempting to corruptly influence the outcome of state court proceedings' "). Rather, such purported actions obviously appear more akin to perquisites accorded in the context of traditional lobbying efforts in the political arena.[9] As the Fourth Circuit has noted in

---

[9] Minnesota law defines "lobbyist" as any person "who spends more than $250 . . . in any year for the purpose of attempting to influence legislative or administrative action by communicating . . . with public officials." Minn. Stat. § 10A.01, subd. 11(b) (1986). Lobbyists are required to register with the state ethical practices board, Minn. Stat. § 10A.03 (1986), and to file regular reports which detail their lobbying expenditures in a number of categories, such as "entertainment provided to public officials including but not limited to sporting, theatrical, and musical events" and "food and beverages provided to public officials. . . . " Minn. Rules § 4510.0500, subp. 3(F) & (G) (1987). These provisions suggest that many of the acts alleged in petitioners' first amended complaint would be regarded, under Minnesota law, as legitimate lobbying activity.

stressing "Congress's intent that RICO serve as a weapon against ongoing unlawful activities whose scope and persistence pose a special threat to social well-being," "[w]hat constitutes a RICO pattern is . . . a matter of criminal dimension and degree." *International Data Bank, Ltd. v. Zepkin, supra,* 812 F.2d at 155; *accord HMK Corp. v. Walsey, supra,* 828 F.2d at 174 ("The existence of a pattern thus depends on context, particularly on the nature of the underlying offenses. Attention to the nature of the underlying offenses is necessary because the heightened civil and criminal penalties of RICO are reserved for schemes whose scope and persistence set them above the routine."). The requisite "criminal dimension and degree" for the establishment of a "pattern" are plainly missing in petitioners' RICO allegations.

Also absent from petitioners' RICO claims is any delineation of separate criminal episodes or transactions resulting in distinct injuries arising from claimed predicate acts having independent harmful significance. As the court explained in *Ghouth v. Conticommodity Services, Inc.*, 642 F. Supp. 1325, 1336-1337 (N.D. Ill. 1986) (citations omitted):

> "The cases reveal several characteristics of the 'episode' which are important, and which are consistent with and flow from the underlying concept of 'continuity.' Probably the most important factor is that the criminal acts cause 'independent harmful significance,' *i.e.*, cause more than one basic injury. This captures the idea that to be 'continuous,' criminal activity and injury should repeat or recur. After all, RICO was designed to combat multiple, systematic infliction of harm . . . . What divides [a] scheme into 'episodes' is multiple, distinct injuries, separated

> in time and place. This is the factor that eliminates . . . RICO abuse . . . . "

Petitioners here cannot and do not contend that each meal or sporting event ticket allegedly provided by Northwestern Bell to a MPUC commissioner standing alone caused a distinct harm to them; instead, it is only through the action of the MPUC in approving what petitioners characterize as "unreasonable" rates that petitioners seek to aver injury. Yet, nowhere in their first amended complaint do petitioners tie the purported predicate acts to any resulting votes cast by particular commissioners in the context of specific rate proceedings. *Cf. Haroco, Inc. v. American Nat'l Bank & Trust Co.*, 747 F.2d 384, 398 (7th Cir. 1984), *aff'd*, 473 U.S. 606 (1985) (the "by reason of" language of section 1964(c) "imposes a proximate cause requirement on [RICO] plaintiffs" so that "[t]he criminal conduct in violation of section 1962 must, directly or indirectly, have injured the plaintiff's business or property"). While petitioners make vague reference to "tainted hearings" and the United States as amicus curiae suggests that petitioners' allegations should be viewed as comprehending multiple efforts by Northwestern Bell "to obtain favorable treatment in several particular rate-setting votes" over the period covered by the first amended complaint (Brief of Petitioners at 5; Brief of Amicus Curiae the United States at 8 n.3), such averments simply are not part of petitioners' pleading and it is axiomatic that "a party is not entitled to amend his pleading through statements in his brief." *Jacobson v. Peat, Marwick, Mitchell & Co.*, 445 F. Supp. 518, 526 (S.D.N.Y. 1977); *accord Chambliss v. Coca-Cola Bottling Corp.*, 274 F. Supp. 401, 409 (E.D.

Tenn. 1967), *aff'd*, 414 F.2d 256 (6th Cir. 1969), *cert. denied*, 397 U.S. 916 (1970).[10]

In addition, because the "pattern requirement was intended to limit RICO to those cases in which racketeering acts are committed in a manner characterizing the defendant as a person who *regularly* commits such crimes" (*Lipin Enterprises Inc. v. Lee, supra*, 803 F.2d at 324 (emphasis added)), analysis of "pattern" averments should not "stop at requiring a showing of multiple episodes because this alone does not adequately resolve the tension between isolated and ongoing activity." *Papai v. Cremosnik*, 635 F. Supp. 1402, 1412 (N.D. Ill. 1986). As the court in *Papai* reasoned, "RICO's purposes are best served by also requiring that, from the pleadings, a reasonable inference can be made that these episodes were not an aberration in the way a defendant conducted his business. Rather, the pattern made up of multiple episodes must be a *regular* part of the way a defendant does business and in that sense, ongoing." *Id.* (emphasis added). Clearly, there is no suggestion whatsoever in this case that bribery or any other crime is a customary activity on the part of Northwestern Bell. There is no indication that the purported illicit conduct pled by petitioners

[10] Petitioners never have materially amended their RICO allegations, although they have had several opportunities to do so. *See* note 5, *supra*. Thus, the presumption is warranted that petitioners are unable to plead distinct injuries arising from separate episodes or transactions.

is in any way regular, typical, or characteristic of Northwestern Bell's operations; that such conduct is a significant, as opposed to incidental, part of Northwestern Bell's relationship with the MPUC; and therefore that such conduct constitutes a RICO "pattern of racketeering activity." The notion of a "pattern" existing in this case is at odds with the manifest intent of Congress in the RICO Act to provide a remedy with respect to those persons and entities engaged in pervasive criminality, not to address claimed aberrational activities of legitimate businesses such as Northwestern Bell.

Further, there is no ongoing criminal enterprise here to supply the element of "continuity" for the establishment of a RICO "pattern of racketeering activity." *See* Brief of Amicus Curiae the United States at 18-19 (arguing that "[t]he thread of continuity, and hence the required pattern, is also present where predicate crimes are committed that in fact benefit an ongoing criminal enterprise . . . , where such an enterprise made possible or facilitated the commission of the predicate crimes . . . , or where the predicate crimes were the defendant's way of participating in such an enterprise"). Unlike *United States v. Ianniello, supra*, 808 F.2d at 186-189, where there was an ongoing association-in-fact "enterprise" operating to skim profits from bars and restaurants and to defraud the tax authorities and where the multiple predicate acts charged related to the conduct of that illegitimate enterprise's affairs, here the "enterprise" alleged by petitioners for purposes of their RICO claims is either Northwestern Bell itself or the MPUC. *See* First Amended Complaint ¶¶ 49, 57, and 65; Appendix at 78-83. Such wholly legitimate entities as the business corporation and

governmental body pled as RICO "enterprises" by petitioners unquestionably do not substitute for a continuous criminal confederation in terms of demonstrating the existence of a "pattern" under the RICO Act.[11]

Accordingly, even if this Court finds it necessary to look beyond the multiple-schemes criterion applied by the Eighth Circuit, examination of those additional factors identified by courts as salient for purposes of evaluating the sufficiency of RICO "pattern" allegations demonstrates that "continuity plus relationship" is not present in this case and that petitioners' RICO averments thus do not meet the statute's "pattern" requirement. Indeed, the District Court, after discussing the several pertinent factors highlighted by other courts, convincingly concluded that petitioners' "allegations do not fit the RICO paradigm" in that they have "not shown independent harmful significance, since it is the aggregate of predicate acts which produced their injuries," and that the averred "pattern" cannot be described as a " 'regular part of the way' [Northwestern Bell] conduct[s] [its] business." 653 F. Supp. at 915-916; Appendix at 27.

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[11] The United States as amicus curiae makes precisely this point: "We do not suggest that the mere fact that several similar crimes are all related in some way to a legitimate enterprise makes a pattern of those crimes. When the crimes are related . . . to a *criminal* enterprise, however, that fact supplies the required element of continuity among the defendant's criminal acts. . . . [T]he fact that the enterprise in certain cases helps establish the pattern in no way equates the two elements or makes one of them redundant." Brief of Amicus Curiae the United States at 19 n.10 (emphasis in original).

Petitioners simply are wrong when they contend that they have properly alleged a "pattern" "under any test used by any circuit other than the Eighth Circuit." Brief of Petitioners at 35. To the contrary, under the standards enunciated by circuits that have seriously grappled with the meaning and application of "continuity plus relationship," petitioners' first amended complaint fails to plead an adequate "pattern of racketeering activity" as required by the RICO Act.

In *Sedima*, this Court recognized Congress' "express admonition that RICO is to 'be liberally construed to effectuate its remedial purposes,' Pub. L. 91-452, § 904(a), 84 Stat. 947." 473 U.S. at 498. Consequently, the Court rejected, as a "form of statutory amendment [not] appropriately undertaken by the courts," efforts to engraft onto the RICO Act a prior criminal conviction requirement and a racketeering injury requirement, reasoning that such prerequisites were without "support in the statute's history, its language, or considerations of policy." *Id.* at 493, 500. Nevertheless, the Court, after specifically discussing the limited scope of "pattern of racketeering activity," expressed its "doubts" about the "increasing divergence" of RICO's utilization in its private civil version from Congressional intent, and identified the "failure . . . to develop a meaningful concept of 'pattern' " as a primary cause of the problem. *Id.* at 496 n.14, 500. Thus, despite petitioners' and certain amici's attempts to portray this case as involving just another baseless obstruction to RICO's proper operation of the kind rebuffed in *Sedima*, in fact at issue here is a wholly appropriate limitation, grounded in the legislative history and compelled by the

ordinary meaning of the statutory language, which is essential to prevent the law's abuse. *See id.* at 496 n.14.

Unless a "meaningful" construction of "pattern" that embraces the "factor of continuity plus relationship" is adopted and applied by the courts, every commercial dispute involving some series of related events can be characterized as a "pattern" and federalized into a RICO cause of action, even though such result certainly was not the design of Congress. *See, e.g., International Data Bank, Ltd. v. Zepkin, supra,* 812 F.2d at 154-155 ("If the commission of two or more 'acts' to perpetrate a single fraud were held to satisfy the RICO statute, then every fraud would constitute 'a pattern of racketeering activity.' It will be the unusual fraud that does not enlist the mails and wires in its service at least twice. Such an interpretation would thus eliminate the pattern requirement altogether."); Report of the Ad Hoc Civil RICO Task Force of the ABA Section of Corporation, Banking and Business Law, *supra,* at 55-56 (of 270 known RICO cases at the trial-court level, only 9% "involve[d] allegations of criminal activity of a type generally associated with professional criminals"); *Sedima, S.P.R.L. v. Imrex Co., supra,* 473 U.S. at 499 n.16.[12] An appropriately constrained explication of "pattern," far from an unfounded hindrance, is key to effectuating the true purpose of the RICO Act.

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[12] In his dissent in *Sedima,* Justice Marshall, joined by Justices Brennan, Blackmun, and Powell, noted "the 'extraordinary uses' to which the statute has been put, in which legitimate businesses that have engaged in two criminal acts have been labelled 'racketeers,' have faced treble-damages judgments . . . , and have often settled to avoid the destructive

(Continued on following page)

While they argue that this Court "should develop a meaningful approach to the definition of 'pattern,'" petitioners approvingly cite the construction of the "pattern" element by some courts that mandates no more than a showing of "two related acts in connection with an enterprise," suggesting that "[s]uch an interpretation would alleviate the problem of notice because there would be no doubt as to the requirements of RICO." Brief of Petitioners at 24-25, 31. Similarly, the United States as amicus curiae contends that "the thread of continuity needed to tie together the commission of predicate crimes so that they form a pattern is present at least when- . . . each predicate crime is 'connected with the other by some common scheme, plan or motive so as to constitute a pattern.'" Brief of Amicus Curiae the United States at 18. These proffered formulations of "pattern of racketeering activity" under RICO, however, miss the mark in that they speak only to the component of "relationship" but disregard the facet of "continuity." As the legislative history makes clear, "[i]t is this factor of *continuity plus relationship* which *combines* to produce a pattern." S. Rep.

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publicity and the resulting harm to reputation," emphasizing that:

> "These cases take their toll; their results distort the market by saddling legitimate businesses with uncalled-for punitive bills and undeserved labels. To allow punitive actions and significant damages for injury beyond that which the statute was intended to target is to achieve nothing the statute sought to achieve, and ironically to injure many of those lawful businesses that the statute sought to protect."

473 U.S. at 520.

No. 617, *supra*, at 158 (emphasis added). And it is only through inclusion of the "continuity" feature that "pattern of racketeering activity" can be harmonized with its plain meaning of typical, consistent, and systematic wrongdoing of widespread design.

Instead of such one-dimensional standards, a "pattern" within the purview of RICO must be evaluated within the factual context of each case in terms of the specific subsection(s) of 18 U.S.C. § 1962 as to which a violation is alleged, and must be scrutinized using the criteria of multiple schemes, as well perhaps as the other factors, detailed above, which courts have designated as evincing "continuity plus relationship" and which therefore aid the "pattern" inquiry. *See* discussion, *supra*, 33-41. Such a particularized, multi-consideration approach appears best suited to ensure the presence of "continuity plus relationship" in each individual RICO case and thus properly to limit the statute as contemplated by Congress.[13] In this case, that preferred approach inescapably leads to the conclusion that petitioners have failed to state an adequate "pattern of racketeering activity" within the meaning of the RICO Act.

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[13] This approach is in accord, insofar as it pertains to the aspect of "relationship," with the definition of "pattern" provided in a subsequent provision of the same bill that contained RICO: "criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." 18 U.S.C. § 3575(e). This "pattern" definition was included in the Dangerous Special Offender Act, which was later repealed effective November 1, 1987, but not in RICO. Sentencing Reform Act of 1984, Pub. L. No. 98-473,

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§ 212(a)(2), 98 Stat. 1987; Sentencing Reform Amendments Act of 1985, Pub. L. No. 99-217, § 4, 99 Stat. 1728. The Court observed in *Sedima* that "[t]his language may be useful in interpreting other sections of the Act." 473 U.S. at 496 n.14. However, one commentator has discerningly noted that the language of section 3575(e) "is exclusively focused on the relatedness of the acts," while the legislative history of RICO's "pattern" requirement "does deal with the element of continuity." Black, *Racketeer Influenced and Corrupt Organizations (RICO) – Securities and Commercial Fraud as Racketeering Crime After Sedima: What Is A 'Pattern of Racketeering Activity'?*, 6 Pace L. Rev. 365, 383 (1986). *See also Russello v. United States*, 464 U.S. 16, 23 (1983), *quoting United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972) (" '[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.' "). To the extent that the treatment of "pattern" in the Dangerous Special Offender Act complemented the use of the term in RICO, it was only with regard to the issue of relatedness.

Moreover, the approach advocated herein, by giving effect to the element of "continuity," is consistent with the holding of this Court in *United States v. Turkette*, *supra*, 452 U.S. at 583 (emphasis added), that a RICO "enterprise" must be "proved by evidence of an *ongoing* organization, formal or informal, and by evidence that the various associates function as a *continuing* unit," as well as with the requirement of 18 U.S.C. § 1962(c) that the alleged person "conduct" the affairs of the enterprise through a pattern of racketeering activity. *See, e.g., United States v. Webster*, 669 F.2d 185, 187 (4th Cir.), *cert. denied*, 456 U.S. 935 (1982) (the term "conduct" "signifies repeated, even patterned carrying on of affairs"). And this suggested method of analyzing "pattern" poses no threat to the effective use of the RICO Act as a criminal law enforcement tool, since

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CONCLUSION

For all the foregoing reasons, the judgment of the United States Court of Appeals for the Eighth Circuit sustaining the District Court's dismissal of petitioners' RICO claims should be affirmed.[14]

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the factors utilized clearly are aimed at the level and degree of illicit conduct which Congress sought to eliminate through the statute's extraordinary remedies. As the Department of Justice already acknowledges in its guidelines, cases which do not involve multiple criminal episodes or transactions should not be prosecuted under RICO. *See* discussion, *supra*, 18.

[14] Petitioners ask that the Eighth Circuit be reversed and that their first amended complaint be reinstated. Brief of Petitioners at 35. However, even if this Court were to determine that the Court of Appeals applied an incorrect standard in assessing the sufficiency of petitioners' "pattern" allegations, the appropriate remedy may well be to vacate the Court of Appeals' judgment and remand for consideration of petitioners' pleading in light of the test articulated by this Court. But in any event, if this Court does not affirm, petitioners would not be entitled to reinstatement of their first amended complaint, because the case would need to be remanded to the Court of Appeals for consideration of the alternate bases for dismissal relied on by the District Court but not addressed by the Eighth Circuit. *See* discussion, *supra*, 9-10.

Dated: July 7, 1988

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No. 87-1252

In The

Supreme Court of the United States

October Term, 1987

H.J. Inc., a Minnesota corporation, Kirk Dahl, Larry Krugen and Mary Krugen, individually and d/b/a Photo Images, Susan Davis, Robert Neal, Isaac H. Ward, Richard L. Anderson, Thomas J. Mott, and all others similarly situated,

Petitioners,

vs.

Northwestern Bell Telephone Company, a subsidiary of U.S. West, A.B.C. individually and D.E.F. as corporations, and other unnamed Co-conspirators,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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ARGUMENT

Although Respondents and Amici have raised a number of new issues, Respondents have expressed some arguments not advanced by Amici. The first portion of this brief will therefore deal with arguments raised by Respondents, and the second portion of the brief will deal with general arguments made by Amici and Respondents.

I. Petitioners Allege a Pattern of Racketeering Activity.

On pages 21-30, Respondents discuss cases which they apparently feel should govern this case in determining whether a pattern has been met. They begin with a discussion of the Eighth Circuit's decisions on the pattern requirement and continue with a discussion of cases from other jurisdictions. The reasons for rejecting the Eighth Circuit's multiple scheme requirement have been discussed thoroughly in Petitioners' Brief, pp. 7-31. Respondents' cases from other jurisdictions simply echo the Eighth Circuit's multiple scheme requirement: the reasoning in these cases should likewise be rejected by this Court.

All of the cases cited by Respondents at pages 21-3 have denied a RICO claim by finding that only a single scheme or criminal episode existed.[1] This is simply the

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[1] *Beauford v. Helmsley,* 843 F.2d 103, 110 (2nd Cir. 1988) (finding "insufficient evidence of continuity in a single criminal episode regardless of how many fraudulent acts it entails."); *Jones v. Lampe,* 845 F.2d 755, 758 (7th Cir. 1988) ("The facts alleged by plaintiffs, however, show only one general scheme . . . concerned one major transaction . . . had four potential victims . . . one distinct injury . . . and threaten no repeated harm."); *Marshall-Silver Construction Company, Inc. v. Mendel,* 835 F.2d 63, 67 (3rd Cir. 1987) ("Here we have a single victim, a single

(Continued on following page)

inverse of a multiple scheme requirement. Therefore, such a limitation, is also in conflict with the RICO statute. The Act requires "a pattern of racketeering activity". 18 U.S.C. § 1962. It does not require a pattern of schemes or a pattern of episodes. Moreover, although the cases cited by Respondents have correctly focused on the element of continuity in attempting to define pattern, many of them appear to be confusing where the continuity must be found. Continuity simply means "not sporadic": "the target of [RICO] is thus not sporadic activity." S. Rep. No. 91-617, p. 158 (1969). In trying to limit RICO, often courts have incorrectly focused on the end goal or the

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injury, and a single short-lived scheme with only two active perpetrators."); *International Data Bank, Ltd. v. Zepkin*, 812 F.2d 149, 154 (4th Cir. 1987) ("a single, limited fraudulent scheme, such as the misleading prospectus in this case, is not of itself self-sufficient to satisfy § 1961(5)."); *Eastern Publishing and Advertising Inc. v. Chesapeake Publishing and Advertising Inc.*, 831 F.2d 488, 492 (4th Cir. 1987) ("a single non recurring scheme to defraud a single entity by taking unfair competitive advantage in a quite narrow business context."); *Garbade v. Great Divide Mining and Milling Corporation*, 831 F.2d 212, 214 (10th Cir. 1987) ("there existed a clear and definite single objective for his [plaintiff's] acts."); *Torwest DBC, Inc. v. Dick*, 810 F.2d 925, 928 (10th Cir. 1987) ("The undisputed facts here reveal that the single scheme at issue involved one victim, . . . and had a single goal, the recovery of secret profits through self-dealing in the sale of DBC."); *Elliot v. Chicago Motor Club Insurance*, 809 F.2d 347, 350 (7th Cir. 1986) ("Because these predicate acts all clearly relate to the same transaction involving a single insurance policy and arising out of one accident, the acts do not support the continuity aspect of the pattern of racketeering."); *Lipin Enterprises, Inc. v. Lee*, 803 F.2d 322, 324 (7th Cir. 1986) ("Lipin's complaint alleges racketeering acts all designed to defraud one victim, Lipin, on one occasion . . ."). The Tenth Circuit has apparently adopted the Eighth Circuit's multiple scheme view without the qualifications that characterized earlier decisions. *Pitts v. Turner & Boisseau Chartered*, 850 F.2d 650, 652 (10th Cir. 1988).

scheme itself rather than the racketeering activity. *See Eastern Publishing & Advertising Inc.*, 831 F.2d 488, 492 (4th Cir. 1987), *pet. for cert. filed*, 56 U.S.L.W. 3667 (No. 87-1530 Feb. 17, 1988) ("There is no inference that the *scheme* embodies a threat of continued like activity in the future.") (emphasis added); *Torwest DBC Inc. v. Dick*, 810 F.2d 925, 929 (10th Cir. 1987) ("no threat of continuing fraudulent activity can be inferred from the *nature of the scheme* itself.") (emphasis added). The statute, however, requires focusing on the repetition of the acts, not the repetition of the "scheme" or "episodes."[2]

Whether there are multiple schemes or one scheme is in essence a question of semantics. One can always find one goal for any amount of activity (e.g. earning an illegal profit); conversely, one can always break down one goal into many activities. Consider two interpretations of Petitioners' claims. The first is that Respondents have gained illegal profits through a pattern of bribery. In this interpretation, there is one scheme, one goal. The second interpretation is that there are multiple acts of bribery, committed by different actors, upon different commissioners, which occurred at different times, different places, in different manners, to influence different rate hearings which would affect different consumers. Depending on which court is interpreting the pattern requirement, either interpretation could suffice to state a claim under RICO. See Petitioners' Brief on the Merits, pp. 27-31.

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[2]Of course the same internal impossibilities created by the Eighth Circuit's multiple scheme vis-a-vis § 1962(b) exists in the cases cited by Respondents. Effectively, they write 1962(b) out of the statute. See pp. 7-31 of Petitioners' Brief.

This amounts to simple semantical game playing. See, *Montesano v. Seafirst Commercial Corp.*, 818 F.2d 423, 426 (5th Cir. 1987) (Higgenbotham, J.) (Commenting on whether his interpretation of pattern "invites unwarranted escape from RICO by a semantical game of generalizing the illegal objective, such as, . . . suggesting that a series of drug transactions are only part of the single offense of drug distribution." Judge Higgenbotham also noted that "[s]uch a generalized objective is undistinguishable from the very criminal enterprise the Act was plainly intended to reach.")[3]

Respondents also state that the conduct alleged by Petitioners "hardly epitomizes a serious 'racketeering activity' that RICO was designed to eradicate." Respondents' Brief, p. 34. They then list numerous offenses at which the Act was aimed, including attempting to bribe local police officers, and corruptly influencing the outcome of state court proceedings. *Id.* at 35. Surely bribing members of the MPUC is as serious as the aforementioned offenses.

[3]Some courts have indicated that one scheme is sufficient if there is independent harmful injury. If the court wanted to engraft this restriction onto the statute, Petitioners would still have stated a cause of action, even accepting Respondents' assumption that the same victims were injured. In *Liquid Air Corporation v. Rogers*, 834 F.2d 1297, 1305 (7th Cir. 1987) *pet. for cert. filed*, 56 U.S.L.W. 3531 (No. 87-1262 Jan. 28, 1988) the court found a pattern noting that each act resulted in a distinct and repeated economic injury upon a single victim of a single scheme. See also *Appley v. West*, 832 F.2d 1021, 1028 (7th Cir. 1987) where the court found that the two predicate acts were designed to defraud the plaintiff twice and therefore found a pattern. Both cases are cited at Respondents' Brief, p. 27. Petitioners in this case suffered economic injury each time that a higher rate was passed where the commissioners were bribed. *See, Suffolk County v. Long Island Lighting Company*, 685 F. Supp. 38 (E.D.N.Y. 1988).

In attempting to whitewash their activities, Respondents state that their actions appear more akin to traditional lobbying efforts. Respondents' Brief at p. 35. While taking serious issue with this argument, Petitioners must point out that this case was dismissed on the pleadings. Whether passing thousands of dollars to commissioners was lobbying activity or bribery is a fact question that should be decided by a jury. Even so, because the case was disposed of on the pleadings and without a factual record, the facts alleged in the complaint must be viewed "in the light most favorable to them [Petitioners]." Respondents' Brief at 11, citing *H.J. Inc.*, 829 F.2d at 649; Appendix at 6.

Respondents also allege that Petitioners' RICO claims fail to allege distinct injuries arising from the claimed predicate acts. Respondents' Brief at 36. Petitioners' second amended complaint under each RICO count alleges that the plaintiffs and the class were injured by reason of those activities. See paragraphs 54, 61, 70, and 74; Appendix, pp. 78, 79, 80 and 81. In addition, in each count Petitioners incorporated the whole complaint, including those paragraphs describing the predicate acts into each RICO count.

II. RICO's Scope Includes Both "Legitimate" and "Illegitimate" Persons/Defendants.

Amici have posed a number of theories for interpreting the pattern requirement under RICO. The contentions of all briefs filed in opposition to Petitioners can be narrowed to one basic argument; that RICO is not aimed at

"legitimate" defendants. Instead, they argue, "pattern" must be interpreted to mean that the acts characterize the "person"/defendant as a habitual or career criminal and these acts must be a substantial part of the "person's"/defendant's relationship with the enterprise.[4] Consequently, they argue that the paradigmatic defendant of RICO is an individual long associated with organized crime. Such an interpretation is not supported by the statutory language, the legislative history or the case law since the passage of the Act in 1970.

A. The Statutory Language of RICO Indicates that Congress Intended to Reach Both "Legitimate" and "Illegitimate" Persons/Defendants.

Amici contend that the scope of § 1962 was intended to encompass only individuals involved in "illegitimate" organizations. To determine what Congress intended, however, the Court must first look to the language Congress employed. *United States v. Turkette*, 452 U.S. 576 (1981). If the language of the statute is unambiguous, absent "a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive." *Id.* at 580, quoting *Consumer Product Safety Commission v. GTE Sylvania Inc.*, 447 U.S. 102, 108 (1980). To determine whether the statute applies to "legitimate" as well as "illegitimate" individuals and entities, one need only look to the statutory language.

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[4]Respondents' Brief, pp. 38-39; Amicus Brief of the Chamber of Commerce of the United States of America, pp. 2, 9; Amicus Brief of the American Institute of Certified Accountants, pp. 6, 8, 15, 20; Amicus Brief of the American Federation of Labor and Congress of Industrial Organizations, pages 2, 10; Amicus Brief of the National Association of Manufacturers, pages 4, 8, 9, 11, 15, 17, 21.

Section 1962(a) states that "[i]t shall be unlawful for *any person* who has received any income derived . . . from a pattern of racketeering activity. . . ." Section 1962(b) makes it unlawful "for *any person* through a pattern of racketeering activity . . . to acquire or maintain . . . any interest in or control of any enterprise. . . ." Finally, § 1962 (c) makes it unlawful "for *any person* employed by or associated with any enterprise . . . to conduct or participate . . . in the conduct of such enterprise's affairs through a pattern of racketeering activity." (emphasis added). In sections a, b and c, the operative word is "person."

No ambiguity surrounds "person." It is defined in § 1961(3) as including "any individual or entity capable of holding a legal or beneficial interest in property." This definition is clear. It envisions individual and entity liability. There is no requirement that the individual or entity be associated with organized crime or that the individual or entity be a career criminal. This principle has been recognized by this Court in *Sedima S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985). *Sedima* specifically stated that no connection to organized crime was needed: "Section 1962 in turn makes it unlawful for 'any person'—not just mobsters—to use money derived from a pattern of racketeering activity to invest in an enterprise, to acquire control of an enterprise through a pattern of racketeering activity, or to conduct an enterprise through a pattern of racketeering activity. Sections 1962 a-c." *Id.* at 495. Despite the fact that "person" is already defined, and that definition acknowledged by this Court, Respondents and Amici, unhappy with the statute, now attempt to change the definition of "person" by backdooring a "mobster" requirement through the word "pattern." They would

achieve this result by suggesting that "pattern" means typical of a kind of individual. But "pattern" relates to activity. Respondent and Amici ignore the grammatical construction of the statute: "pattern" is used in conjunction with the word "activity"; not with the word "person."

"RICO takes aim at 'racketeering activity'." *Sedima*, 473 U.S. at 481. Indeed, the statute refers to a pattern of acts; not a pattern of persons. "Racketeering activity" is defined in § 1961(1) and encompasses a number of activities, including bribery, which is the activity alleged in this suit. The statute prohibits certain conduct which is prohibited regardless of what person or entity performs it. "There is nothing in RICO that says that, if legitimate businessmen act like racketeers, they should not be treated like racketeers." Blakey and Gettings, *Racketeer Influence and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies*, 53 Temple Law Quarterly 1009, 1029 n.92 (1980) (hereinafter referred to as *Basic Concepts*).

It is clear from the statutory language that Congress placed no restrictions upon the type of "persons"/defendants coming within the purview of RICO. RICO is not a recidivist statute. RICO is activity-aimed; not "person"/defendant aimed. That Congress could have limited Title IX, RICO, to habitual offenders is shown by a reference to other Titles of the Organized Crime Control Act of 1970. Section 3575 of Title X, entitled "Increased Sentence for Dangerous Special Offenders," deals with dangerous persons, including career criminals. Its provisions allow for increased sentencing for all felonies, including RICO, when the criteria in the statute are met. Title X

is person oriented. It is aimed at the defendant, not the activity. A defendant is classified as a special offender if "the *defendant* has previously been convicted . . . for two or more offenses committed on occasions different from one another and from such felony and punishable in such courts by death or imprisonment in excess of one year . . .", § 3575(e)(1), or "the *defendant* committed such felony as part of a pattern of conduct which was criminal under applicable laws of any jurisdiction, which constituted a substantial source of *his* income, and in which *he* manifested special skill or expertise;" § 3575(e)(2), or "such felony was, or the *defendant* committed such felony in furtherance of, a conspiracy with three or more other *persons* to engage in a pattern of conduct criminal under applicable laws of any jurisdiction. . . ." § 3575(e)(3) (emphasis added).

Both Titles IX and X were written by the same Congress in the same Act. Congress, in attempting to achieve separate goals defined the class person/defendant with limitations in Title X but defined the class "person"/defendant without such limitations in Title IX. Amici, realizing that they may have liability under the Title IX (RICO) definition of person, are trying to get this Court to do what Congress specifically chose not to do. Realizing that they cannot directly change the RICO definition of "person", Amici are trying to accomplish their goal (escaping possible Title IX RICO liability) by reading undefined concepts of organized crime, habitual, career, or professional criminality into Title IX. Had Congress wanted to

include these concepts, it knew how: it proved it did so in Title X.[5]

The distinction between Title IX and Title X was well recognized. Senator John McClellan, the sponsor of the Organized Crime Control Act of 1969 wrote a response to the critics of the bill in the fall of 1970 and distinguished Title IX and Title X.

> The basic provisions of title IX are substantive: they define conduct as prohibited. These provisions implement economic policy by authorizing the removal of corrupt influences from legitimate commercial enterprises, and the commission of an offense listed in title IX subjects one to the remedies of the title only if the offense bears a specified relationship to interstate commercial activity. Since the purpose of title IX is economic, it would be pointless surplusage for it to cover crimes that are not adapted to commercial exploitation. This is why the particular offenses which are well-suited for use to infiltrate a legitimate organization were listed in a section defining one of the substantive elements of title IX.
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> Title X, in contrast, is not substantive: it deals solely with the penal disposition of individuals already convicted of substantive crimes. Its purpose is not confined to one sphere, such as economic policy, which can be treated separately from other problems. The activities of organized criminals extend beyond commercial exploitation, such as that treated by title IX, and bring them in violation of every felony in the books. The problem which title X solves is the problem of distinguishing the aggravated offender from the ordinary offender, and that problem is the same whatever felony was committed. It is the definitions of "dangerous special offenders" which appropriately limit the scope of title X, just as it is a list of offenses which limits that of title IX.

Senator John McClellan, *The Organized Crime Act (S.30) or its Critics: Which Threatens Civil Liberties,* Notre Dame Lawyer, 55, 161-62 (1970).[6]

It is interesting that Congress stated in § 3575(e) that "[f]or purposes of paragraphs (2) and (3) of this subsection, criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristcs and are not isolated events." In *Sedima*, this Court noted that these elements of "continuity plus relationship" combine to produce a pattern. 473 U.S. at 496, n.14. The Court then quoted the above definition from Title X and stated that the language "may be useful." *Id.* Indeed, an examination proves so. This definition satisfies both components of the court's definition of pattern. The first section of the Title X definition deals with the relationship element and the final four words deal with the continuity element. These same two components of the word pattern are required in Title IX, § 1962(a), (b) and (c) and consequently the same language can be used. No one has

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[5]Amici must recognize that their arguments are essentially political in nature, for a debate currently rages in Congress over the possible amendment of the RICO statute. Nevertheless, Amici attempt to disguise their political wolf in legal sheepskin in the instant case. If the statute needs to be corrected, "its correction must lie with Congress." *Sedima*, 473 U.S. at 499.

[6]Other sections of the Organized Crime Act are person-oriented as well. See generally Senator McClellans' article for a discussion of each of RICO's Titles.

criticized the Court's statement that § 3575 may be useful, and indeed, the definition is useful.[7]

The wording of Title IX, RICO, is clear. Nowhere is there any reference to limiting those "persons" engaged in racketeering activity to any specific group. The statute itself belies Respondents' and Amici's arguments that RICO does not apply to "legitimate" "persons"/defendants. Defendant Northwestern Bell is therefore correctly before this Court.

B. RICO's Legislative History Shows that Congress Intended RICO to Apply to both "Legitimate" and "Illegitimate" Defendants.

The Racketeer Influenced and Corrupt Organizations Act (RICO), part of the Organized Crime Control Act of 1970, was enacted as a result of the long process of legislative effort to develop new methods for dealing with organized crime. Although there is no consensus on what constitutes organized crime,[8] the tendency to identify or-

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[7]This definition has been used almost word for word in the state RICO statutes to define pattern, *See Morehead v. State*, 838 So.2d 629, 630 (Fla. 1980), and was previously applied in defining "pattern" by the Eighth Circuit. *See Alexander Grant & Company v. Tiffany Industries, Inc.*, 742 F.2d 408 (8th Cir. 1985) *cert. denied*, 106 S.Ct. 799 (1986).

[8]For a discussion of the lack of consensus regarding the definition of "organized crime" see *Basic Concepts, supra* p. 8, at 1013, n.15. "However, the phrase is defined, the scope of the "Organized Control Act was not limited to the operations of 'organized crime.'" *Id.* Even if this Court viewed a requirement of an association with organized crime, it most likely would make the statute constitutionally suspect. Amendments had been offered to limit the bill to organized crime; but were rejected due to their perceived unconstitutionality.

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ganized crime with Mafia figures has been rejected by the author of the Act, Senator John McClellan. Gambling in America: Report of the Commission on the Review of National Policy Towards Gambling, 181-82 (1976) "In none of the hearings or in the process of legislation in which I have been involved has the term been used in this circumscribed fashion." RICO is therefore aimed at the broader concept of "enterprise criminality,"[9] in all its aspects. Indeed, RICO's scope beyond organized crime was objected to on civil liberties grounds. In response, Congressman Poff observed:

> The curious objection has been raised to S.30 as a whole, and to several of its provisions in particular, that they are not somehow limited to organized crime —as if organized crime were a precise and operative legal concept, like murder, rape or robbery. Actually, of course, it is a functional concept like white collar or street crime serving simply as a shorthand method of referring to a large and varying group of individual criminal offenses committed in diverse circumstances.

116 Cong. Rec. 35344 (1970) (Statement of Rep. Poff)

The AFL-CIO, at p. 13, conceded that Senator McClellan also acknowledged criticism that RICO included

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See, Blakey, *The Civil Fraud Action in Context: Reflections on Bennett v. Berg*, 58 Notre Dame L. Rev. 237, 297 (1987). Even the Amicus Brief of the National Association of Manufacturers' noted that congress acknowledged that such a limitation would be an unconstitutional status offense. N.A.M. Brief, p. 10 In essense, Amici and Respondents are attempting to aim the statute at the person, which may well make it a status offense and unconstitutional.

[9]See, Blakey, *The Civil Fraud Action in Context: Reflections on Bennett v. Berg*, 58 Notre Dame L. Rev. 237, 253 n.46 (1982).

activity that went beyond offenses committed by organized crime. Senator McClellan responded:

> The bar committee complains that the list is too inclusive since it includes offenses which often are committed by persons not engaged in organized crime. The senate report does not claim, however, that the listed offenses are committed primarily by members of organized crime, only that those offenses are characteristic of organized crime. The listed offenses lend themselves to organized commercial expectation unlike some other offenses such as rape, and experience has shown that they commonly are committed by participants in organized crime. That is all the Title IX list of offenses purports to be, that is all the senate report claims it to be, and that is all it should be.
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> It is impossible to draw an effective statute which reaches most of the commercial activities of organized crime, yet does not include offenses commonly committed by persons outside organized crime as well.

116 Cong. Rec. 18, 913-14 (1970). The AFL-CIO argues, however, that Senator McClellan made clear that RICO was not intended to reach beyond organized crime: "Thus, Senator McClellan minimized the 'danger that commission of such [listed] offenses by other individuals would subject them to proceedings under Title IX . . .[,] since commission of a crime listed under Title IX . . . provides only one element of Title IX's prohibitions.' " AFL-CIO Brief at 14. However, Amicus' interpretation is a contradiction. How could Senator McClellan acknowledge that RICO includes activities committed by those not involved in organized crime and then deny its reach beyond organized crime? Senator McClellan's statements should

be interpreted to mean exactly what they say: RICO's purview goes beyond organized crime and those who meet the criteria of RICO are subject to its provisions.

Just as telling in determining congressional intent, however, are the objections recorded by congressional members and other commentators. In the House, Congressman William F. Ryan, John Conyers, Jr. and Abner J. Mikvi objected to the bill as "a tool to be employed by all." H. R. Rep. No. 1549, 91st Cong., 2nd Sess. 187 (1970). The bill did not, they maintained, "make [a] discreet segregation of mobsters." *Id.* They also charged that the treble damage action "provide[d] invitation for disgruntled and malicious competitors to harrass innocent businessmen engaged in interstate commerce." *Id.*

In the Senate, Senators Phillip A. Hart and Edward M. Kennedy also expressed the concern that "the reach of [the] . . . bill . . . [went] beyond organized criminal activity." Sen. Rep. No. 619, 91st Cong., 1st Sess. 215 (1969). In addition, objections were made by the American Civil Liberties Union (ACLU) and the Association of the Bar of the City of New York. The ACLU recognized that RICO applied beyond organized crime and expressed concern that RICO provisions would infringe upon the civil rights of white collar and political activist defendants. *See, Basic Concepts, supra* p. 8, at 1018 n.55. Congressman Poff's reply indicated that he was well aware that RICO had a reach beyond organized crime:

> S.30 is objectional on civil liberties grounds, it is suggested, because its provisions have an incidental reach beyond organized crime. Coming from those concerned with civil liberty in particular, this objection is indeed strange. Have they forgotten that the Consti-

> tution applies to those engaged in organized crime just as it applies to those engaged in white collar or street crime? S. 30 must I suggest, stand or fall on the constitutional questions without regard to the degree to which it is limited to organized crime cases.

116 Cong. Rec. 35344 (1970) (statement by Rep. Poff). The National Association of Manufacturers assume that this statement means any reach beyond organized crime would be small. However, "incidental" does not mean "minor"; it means "1. happening or likely to happen in fortuitous or subordinate conjunction with something else. 2. liable to happen or naturally appertaining (fol. by *to.*)" The American College Dictionary p. 612 (1962). In short, RICO's reach beyond organized crime was explicitly recognized as a natural consequence of the activities prescribed.[10]

Similarly, the Association of the Bar of the City of New York filed a written statement criticizing the scope of "racketeering activity" and stating that the reach of the bill extended beyond organized crime. Senator McClellan responded in detail on the Senate floor, acknowledging that the statute was originally drafted in response to organized crime, but that Congress had a duty to pass comprehensive legislation and that such an objection was not valid. *See,* Blakey, *The Civil RICO Fraud Action in Context: Reflections on Bennett v. Berg,* 58 Notre Dame L. Rev. 237, 272-

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[10]It should be noted that, in discussing Congress' addition of mail and wire fraud, Amicus National Association of Manufacturers concedes that as a result, it "did have the indirect consequence of broadening the reach of RICO beyond the Mafia." National Association of Manufacturers' Brief at 12.

73 (1982) (hereinafter referred to as *Civil Action*). In spite of these objections, the bill was passed.[11]

RICO was passed in response to problems created by organized crime. Both the House and Senate perceived the problem to be great enough so as to justify passage even though they knew it would reach beyond organized crime. Amici and Respondents ignore Congress' fully debated understanding of its own actions. They look at only what gave rise to RICO, not to Congress' actual intent. They are looking at the origins of the statute, and not the final bill. There is no rule that statutes must be confined to the problems which gave rise to the legislation. See *Diamond v. Chakrabarty,* 447 U.S. 303, 315-16 (1980) (where it was noted that "this Court frequently has observed that a statute is not confined to the 'particular application[s] . . . contemplated by the legislators'.") Because the Organized Crime Control Act, including Title IX was passed as a general reform statute, it conforms to a consistent policy whereby courts have not restricted statutes to the specific reason for their passage.[12]

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[11]For a detailed discussion of the entire legislative history in both the House and Senate, see, *Civil Actions, supra* p. 16, at 249-83; *Basic Concepts, supra* p. 8, at 1010-21.

[12]Blakey, & Cessar, *Equitable Relief Under Civil RICO: Reflections on Religious Technology Center v. Wollersheim: Will Civil RICO be Effective Only Against White-Collar Crime?,* 62 Notre Dame L. Rev. 526, 530 n.13 (1987). (Hereinafter referred to as *Equitable Relief.*) For a discussion of this policy of non-limitation and citations to cases where it has been implemented, see, Goldsmith and Keith, *Civil RICO Abuse: The Allegations in Context, Brigham* Young Univ. L. Rev. 53, 73, n.85. (1986). *See also Equitable Relief,* at 566, n.187.

C. Case Law Indicates that RICO is not Limited in its Application to Illegitimate Businesses Only.

Sedima and *Turkette* are this Court's most recent pronouncements regarding the application of RICO. Both cases rejected attempts to place limitations on the statute. In *Sedima*, the court noted that civil RICO was being used against "respected and legitimate enterprises" instead of against mobsters and organized criminals. It commented however that Congress wanted to reach both "legitimate" and "illegitimate" enterprises. *Sedima*, 473 U.S. at 499 *citing Turkette*. The court commented that "[t]he fact that § 1964(c) is used against respected businesses allegedly engaged in a pattern of specifically identified criminal conduct is hardly a sufficient reason for assuming that the provision is being misconstrued." *Id.* *Sedima* also found no ambiguity: "[T]he fact that RICO has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth." *Id.* quoting *Haroco v. American National Bank and Trust Company of Chicago*, 747 F.2d 384 398, (7th Cir.1984), *aff'd* 473 U.S. 606 (1985).

In spite of these pronouncements by this Court, Respondents and Amici are again attempting to place virtually identical limitations on RICO. In *Sedima*, they sought to limit the word "person" to convicted criminals; here they seek to limit the word "pattern" to "career criminals". Indeed, Circuit Courts both pre and post *Sedima* have noted that RICO does not require proof that the defendant is connected with organized crime. *Bennett v. Burg*, 685 F.2d 1053, 1063 (1982) ("We join an increasing number of courts and commentators in concluding that RICO suits are not limited to contexts in which

a tie to organized crime is alleged."); *United States v. Aleman*, 609 F.2d 298, 303 (7th Cir. 1979) ("The clear implication is that it is realized that the Act is not restricted to members of organized crime, but can be used to reach out for others if the statutory conditions are met.").

In *Sedima*, the defendant was a corporation—no question was made as to whether it constituted a defendant that came within the purview of RICO. Furthermore, this Court need only review the table of cases in all the briefs in this case to see the long judicial history of applying RICO to civil "persons"/defendants without questioning whether they were "career criminals." Although Petitioners have demonstrated that there is division in the circuits regarding the application of "pattern of racketeering activity", courts, post-*Sedima*, have not indulged in the dead issue of whether the defendant shows signs of being a "career criminal." Surely this Court does not wish to overturn the lengthy RICO case law which has applied equally to all those who commit the acts defined in § 1961(1). This Court put the criminal argument to rest in *Sedima*—yet in a Lazarus-like attempt, Amici have seized this opportunity to seek its resurrection.

III. Respondents and Amici Definition of Pattern Would Effectively Exclude RICO's Application to White Collar Crime.

Respondents and Amici argue that RICO does not apply to "legitimate" businesses (allegedly like themselves), and that there must be a showing that the defendant is a "career criminal" whose actions are typical of and play a substantial part in the business. Of course this effectively precludes the application of RICO to white collar crime. But by accepting such an elitest argument,

this Court would be closing its eyes to major "racketeering activity" in this country. "White-Collar Crime is 'the most serious and all-pervasive crime problem in America today.' Conyers, *Corporation and White-Collar Crime: A View by the Chairman of the House Subcommittee on Crime,* 17 Am. Crim. L. Rev. 287,288 (1980). Although this statement was made in 1980, there is no reason to think that the problem has diminished in the meantime." *Braswell v. United States,* 43 Crim. L. Rptr. 3103, 3107, n. 9 (United States Supreme Court 1988) (Rehnquist, C.J.).

As has been discussed, Congress expected that RICO would be applied beyond organized crime; indeed, specific congressional references were made regarding the application to professionals. The history of RICO indicates that its language was addressed towards accounting firms, brokerage houses, banking, insurance, and stocks and bonds. *See Civil Actions, supra* p. 16, at 253 n.45, 254 n.48, 50, 257 n.56, 270 n.95 (1982).

Estimates of white collar crime in the fraud area alone indicates it to be in the $200 billion range. *See* Atty. Gen. Ann. Rep. 42 (1985). Fraud exclusively against the government, has been estimated to be between 2.5 and 25 billion dollars a year. *Civil RICO Abuse, supra* p. 17, n.12, at pp. 78, 79, nn.104, 106. In addition, so-called "legitimate" and even highly respected commercial enterprises in this country have engaged in criminal conduct to a surprising degree. Between 1970 and 1980, 1,043 major corporations were indicted for a variety of violations. Blakey & Cessar, *Equitable Relief Under Civil* RICO: *Reflections in Religious Technology Center v. Wollersheim, Will Civil RICO be Effective only Against White-Collar Crime?,* 62 Notre Dame L. Rev. 526, 535, n.36 (1987) (hereinafter referred to as *Equitable Relief*). The

suggestion by Respondents and Amici that this type of activity not be included under RICO raises a suggestion that racketeering acts committed by "legitimate" businesses is somehow not serious or not "real crime". The statistics regarding fraud however do not suggest such a result. "Legitimate" persons commit real crime; they commit serious crime. In *Furman v. Cirrito,* 741 F.2d 524, 528-29 (2d Cir. 1984), Judge Pratt observed:

> When congress provided severe sanctions, both civil and criminal, for conducting the affairs of an "enterprise" through a "pattern of racketeering activity," it provided no exception for businessmen, for white collar workers, for bankers, or for stockbrokers. If the conduct of such people can sometimes fairly be characterized as "garden variety fraud," we can only conclude that by the RICO statute congress has provided an additional means to weed that "garden" of its fraud.

This sentiment was also well stated in *Sedima* where the court acknowledged that RICO has become a tool for everyday fraud cases brought against "respected and legitimate 'enterprises.'" *Id.* at 499. The Court noted however that congress wanted to reach both "legitimate" and "illegitimate" enterprises and stated that "[t]he former enjoy neither an inherent capacity for criminal activity nor immunity from its consequences." *Id.* RICO therefore applies to all who violate its provisions whether they wear a white collar or a blue collar.[13] Respondents and

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[13]This principle, that RICO clearly applies to white collar crime, is specifically stated in *Papai v. Cremosnik,* 635 F.Supp. 1402, 1412 (E.D.N.Y. 1988), a case curiously relied upon by Respondents and the Amici. A full examination of that case reveals that Judge Moran intended that RICO apply to the very types of offenses that Respondent and the Amici are trying to argue are not within the purview of RICO. When Judge

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Amici's attempt to separate "them" from "us", the "haves" from the "have nots", the "blue collars" from the "white collars" cannot be accepted.

IV. The Rule of Lenity does not Apply to RICO.

Respondents and Amici argue that in construing RICO's provisions, the rule of lenity applies and requires a strict construction of the act. The rule of lenity has no constitutional status: it is instead a rule of the statutory construction to resolve ambiguity. "[T]hat 'rule', as is true of any guide to statutory construction, only serves as an aid for resolving an ambiguity; it is not to be used to beget one. . . . The rule comes into operation at the end of a process of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers." *Callahan v. United States,* 364 U.S. 587, 596 (1961) (Footnotes omitted). Quoted in *United States v. Turkette,* 452 U.S. 576, 587-88 n.10 (1981).

The rule of lenity need not be applied to RICO. This rule is based on two policies; (1) the principle of fair warning regarding what is proscribed, and (2) because of the resulting moral condemnation, the related principle that legislatures, not courts, should define criminal

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Moran used the phrase "regular part of the way a defendant does business" it is obvious that he used the word "regular" to mean, not an abberation, or a sporadic event, but rather, as he says, "ongoing." Otherwise, he would not have held that white collar crime comes within the purview of the statute. The *Papai case,* in no wav, supports the proposition that the person/defendant must be a "mobster" type or that the criminal activity must be a "substantial" part of the person/defendant's activity.

activity. *Dunn v. United States,* 442 U.S. 100, 112 (1979); *United States v. Bass,* 404 U.S. 336, 347-48 (1971). The principle that fair warning must be given regarding the criminality of an act is met when the predicate offenses are so construed. See *United States v. Swiderski,* 593 F.2d 1246, 1249 (D.C. Cir. 1978), *cert. denied* 441 U.S. 933 (1979) ("requirement that each defendant be guilty of two acts of racketeering activity rebuts . . . argument that . . . the statute is unconstitutionally vague."). If lenity is applied, it must be applied to an interpretation of the predicate offenses which make up part of the RICO statute. This is especially true since the role of RICO is not to define a criminal act, but to set a legal standard. RICO makes it unlawful to engage in certain activity which has already been defined as criminal.

Similarly, the moral condemnation principle, also upon which the rule of lenity is based, is shown by the violation of the two predicate offenses. Through the application of the liberal construction clause, this condemnation may be enhanced, but it is the result of an express Congressional direction and not a result of a judicial determination. To the extent that RICO is a "remedial" statute, see Pub. L. 91-4 52, § 904(a), 84 stat. 947 (RICO is to "be liberally construed to effectuate its remedial purposes."), Congress felt that the policy of leniency was not appropriate in the context of RICO.[14]

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[14]*Basic Concepts, supra* p. 8, 1009, 1031-32 (1980). For a thorough discussion of the rule and its application see *Civil Actions, supra* p. 16, at 243 n.20, 245 n.25, 288 n.150 (1982).

On pages 20-21 n.7, Respondent suggests that because "pattern" is not clearly defined in the statute that RICO is

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V. The use of RICO has not Resulted in Serious Abuse.

Amici argue that RICO has resulted in serious abuse in that it encourages extortionate claims and results in windfall recoveries. The impact of abuses of claims has been overstated in that such frivolous actions, to the extent that they have occurred, have been dismissed at the pleading stages. Furthermore, despite anecdotes by those opposing RICO, there has been no showing that a pattern of windfall benefits has developed. Goldsmith, *Civil RICO Reform: The Basis for Compromise*, 71 Minn. L. Rev. 827, 837 (1977) (hereinafter referred to as *Civil RICO Reform*). In fact, one commentator has commented that "[i]t almost makes one wonder what the fuss is about." *Id.* n.45.

Although abuse may occasionally occur, the issue has been exaggerated and adequate remedies exist. *Id.* at 69. *See also, Equitable Relief, supra* p. 17 n.12, at 526, 571 n.196. (Report of the Proceedings of the Judicial Conference of the United States, September 21 - 22, 1983 at 56 where it was reported that "the existing tools are sufficient, but perhaps not fully understood or utilized.").

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vague and therefore vulnerable to attack on constitutional grounds. Such a proposition was long ago rejected. *See, e.g. United States v. Parness*, 503 F.2d 430, 441-42 (2nd Cir. 1974) *cert. denied*, 419 U.S. 1105 (1975). Respondents do concede, however, that only by applying the factors of "continuity" and "relationship" and the legislative history of the "pattern" requirement "can the RICO Act provide an ascertainable standard and even arguably meet a vagueness challenge." *Id.* at 21, n.7. Respondents have, however, made no formal challenge to the constitutionality of the RICO statute and it is not an issue in this case. For a discussion of the rule of lenity in conjunction with the concept of vagueness, see *Civil Actions, supra* p.16, at 288 n.150.

These remedies include a more aggressive use of the Federal Rules of Civil Procedure. Specifically, Rule 12(b)(6), which authorizes dismissals for failure to state a claim, bringing a Rule 16 request for a pretrial conference geared toward eliminating any frivolous claims, a motion for summary judgment under Rule 56 and most especially the coordinated use of Rules 9(b) and 11, where sanctions may be given. For an in depth discussion of these Rules and their uses, see *Civil RICO Reform, supra* p. 24, at 86-97.

Abuse of RICO claims are being promptly handled and do not provide a basis for this court to follow Amici and Respondents' suggestion that further limitations be placed upon RICO. "Frivolous cases should be treated as exactly that, and not as occasions for fundamental shifts in legal doctrine. Our legal system has developed procedures for speedily disposing of unfounded claims; if they are inadequate to protect [individuals] from vexatious litigation, then there is something wrong with those procedures, not with the law . . . ." *Hoover v. Ronwin*, 466 U.S. 558, 601 (1984) (Stevens, J, dissenting) (footnote omitted).

Amici also suggest that because of the "racketeering" label, legitimate defendants have been coerced into settling unmeritorious claims. This is simply not the case. *See, Equitable Relief, supra* p. 17 n.12, at 596-97 n.193. Amici's authority for this proposition is a report of the ad hoc Civil RICO Task Force of the ABA Section on Corporation, Banking and Business Law 69 (1985). The Task Force conducted a survey of 3,200 corporate litigation lawyers only of whom 350 responded. The survey did not ask those surveyed a carefully phrased question regarding the use of RICO as a settlement tool. Despite

this obvious problem, the opinion that RICO may be used as a weapon requiring settlement was volunteered by only 2 of the 350 respondents. *Id.*

Amici's suggestion regarding settlement is also somewhat incredible. If a suit is "meritless", the chance of the plaintiff succeeding is zero. Why would a RICO defendant settle a case if the plaintiff's suit is meritless and would be dismissed or lost at trial? Such a view also ignores the plaintiff's view in bringing suit. Given the substantial costs of litigation, it is unlikely that a plaintiff would risk great sums on a claim that has no merit.

VI. Pattern is Defined by the Elements of "Continuity" and "Relatedness".

Respondents and Amici cite definitions from various dictionaries to support their view that "pattern" is not aimed at legitimate "person"/defendants but at career criminals who regularly conduct illegal activity as a part of their way of doing business. However, most of the definitions cited by the Respondent and Amici are not correctly applied in this case. The definitions, or common usage, must be from the time of the enactment of the statute. In *Perrin v. United States*, 444 U.S. 37, 42 (1979), a case involving the application of common law bribery, this Court stated: "A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary

common meaning. . . . Therefore, we look to the ordinary meaning of the term 'bribery' at the time Congress enacted the statute in 1961."

In reality, however, Amici and Respondents have mistaken exactly what needs to be defined. Congress has already provided a workable definition of the term "pattern." It has stated that two elements, "continuity" and "relationship," are needed to form a pattern. "It is this factor of continuity plus relationship which combines to produce a pattern." S. Rep. No. 91-617, p. 158 (1969). Rather than seeking the definition of the term "pattern", we should define "continuity" and "relationship." Most courts have been in agreement regarding what is required to show relationship, and indeed, this element is not an issue here. Relationship generally means that the criminal acts are related to or have the same or similar purposes, results, participants, victims, or means of commissions, or show other interrelationships with distinguishing characteristics. See, *infra* p. 7.

The definition of the "continuity" element, however, has proved to be more elusive. Congress, here too, has defined the concept. The racketeering activity must not be "sporadic" and must show the "threat of continuing activity". *Id.* The acts must not be "an isolated event." *See*, S. Rep. No. 617, 91st Cong. 1st Sess. 158 (1969). None of these statements by Congress indicates that the continuity includes a requirement that the acts must be a part of the regular way the "person"/defendant does business, that the "person"/defendant must be a career criminal, or that the "person"/defendant cannot be "legitimate". This concept also does not indicate that the

racketeering activity must be separate or must be part of multiple schemes.

For racketeering acts to be "not sporadic" and "not isolated" they must be repeated or continuous, or capable of repetition. This satisfies the element of continuity. In order to determine if the acts are repetitive or capable of being repeated, however, the racketeering acts must always be timely viewed. Amici suggest that the element of continuity must be examined when the activity is over. However, this places RICO plaintiffs, or the government, in a Catch-22 situation. Many times, they cannot bring suit until the end of the activity because they are unaware it is happening or the defendants have been caught and the activity ended. Amici would then argue that because the activity is over, there is no continuity. The better view is that the acts must be evaluated while the activity is occurring rather than at its end or when the activity is discovered.[15]

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[15]*See, Barticheck* v. *Fidelity Union Bank/First National State,* 832 F.2d 36, 39 (3rd Cir. 1987) (rejecting the requirement of open-endedness, stating that such an interpretation "would deny a RICO cause of action in a case where this scheme had fully accomplished its goal."); *Liquid Air Corporation* v. *Rogers,* 834 F.2d 1297, 1308-09 (7th Cir. 1987) ("Continuity refers instead to the duration of the predicate acts"); *Sun Savings and Loan Association* v. *Dierdorff,* 825 F.2d 187, 194 n.5 (9th Cir. 1987) ("As long as a threat of continuing activity exists at some point during the racketeering activity, the continuity requirement is satisfied."); *City of New York* v. *Balkin,* 656 F. Supp. 536, 545 (E.D.N.Y. 1987) ("the threat of continuity is to be evaluated during the existence of the criminal activity, not after its discovery.")

An examination of the instant case in this context shows that the continuity element has been met. The activities of Respondents continued for a period of four years. The racketeering acts of bribery were repeated numerous times during that time. If Respondents had not been caught, this activity, no doubt, would have continued and was certainly capable of continuing. Furthermore, in this case, the fruits of the activity continue well into the future. Each rate case that was decided due to the bribery of the Minnesota Public Utility Commission resulted in higher rates than the one before. The class of people named in this Complaint have suffered excess rate upon excess rate. Northwestern Bell will continue to reap this benefit for many years to come. See *County of Suffolk v. Long Island Lighting Company,* 685 F. Supp. 38 (S.D.N.Y. 1988).

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CONCLUSION

The statutory language, the legislative history, and the case law do not support Respondents' and Amici's attempts to insulate themselves from the enforcement of Title IX (RICO). Therefore, Petitioners respectfully request this Court to reverse the Eighth Circuit's decision.

Respectfully submitted,

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No. 87-1252

In the Supreme Court of the United States

OCTOBER TERM, 1987

H.J. INC., ET AL., PETITIONERS

v.

NORTHWESTERN BELL TELEPHONE COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether petitioners alleged a "pattern of racketeering activity" under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. (& Supp. IV) 1961-1968.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

This case concerns the meaning of the phrase "pattern of racketeering activity," which is an element of violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. (& Supp. IV) 1961-1968. The United States brings both criminal prosecutions and civil suits under RICO. It has a strong interest in ensuring that the "pattern" element is properly interpreted so that RICO may serve its intended function as an important means of combatting organized criminal activity.

STATEMENT

Petitioners, who are purchasers of telecommunications goods and services from respondent Northwestern Bell, brought this class action in 1986 under the civil-liability provisions of RICO, 18 U.S.C. 1964(a) and (c). They alleged that respondent Northwestern Bell and others,

from 1980 through 1986, offered, promised, or gave benefits to members of the Minnesota Public Utility Commission with the intent to influence the Commissioners in the performance of their duties as regulators of Northwestern Bell. Those acts, they alleged, were in violation of a Minnesota criminal bribery statute, Minn. Stat. Ann. § 609.42.1(1) and (2) (West 1987), and the common law of bribery. The alleged acts constituted acts of "racketeering activity" under RICO, 18 U.S.C. (& Supp. IV) 1961(1)(A), which includes acts or threats involving bribery that are chargeable under state law and punishable by imprisonment for more than one year.

Based on those allegations, petitioners asserted, in addition to state law claims (Count 1), violations of each of the four provisions of 18 U.S.C. 1962, which defines the activities prohibited by RICO. They alleged (Count 2) that Northwestern Bell had received income from a "pattern of racketeering activity" consisting of the acts of bribery, and that the income, or its proceeds, had been used in the operation of Northwestern Bell, an "enterprise" engaged in interstate commerce, in violation of Section 1962(a). They also alleged (Count 3) that respondents and others, through the same pattern of racketeering activity, had acquired or maintained an interest in or control of the Public Utility Commission, an enterprise engaged in or whose activities affected interstate commerce, in violation of Section 1962(b). They further alleged (Count 4) that respondents and others had participated in the conduct and affairs of the Public Utility Commission through the same pattern of racketeering activity, in violation of Section 1962(c). Finally, they alleged (Count 5) that respondents and others had conspired to violate Section 1962(a), (b), and (c), in violation of Section 1962(d). Petitioners alleged that they were injured by that conduct,

which caused the Commission to allow Northwestern Bell to charge their customers excessive rates for goods and services. They sought, among other relief, an injunction against Northwestern Bell and treble damages under 18 U.S.C. (& Supp. IV) 1964.

The United States District Court for the District of Minnesota granted respondents' motion to dismiss the complaint (Pet. App. A8-A47). The court read the complaint as alleging a single scheme to influence the Commissioners to the detriment of ratepayers (*id.* at A36). Accordingly, the court held (*id.* at A23, A39) that petitioners had failed to state a claim under Eighth Circuit precedent establishing that a RICO "pattern of racketeering activity" requires multiple separate schemes. *E.g.*, *Holmberg* v. *Morrisette*, 800 F.2d 205, 209-210 (1986), cert. denied, No. 86-1174 (Apr. 27, 1987); *Superior Oil Co.* v. *Fulmer*, 785 F.2d 252, 255-256 (1986).

On appeal, the United States Court of Appeals for the Eighth Circuit affirmed on the same ground (Pet. App. A3-A7).[1] The court acknowledged that its multiple-schemes requirement had been criticized by other circuits (*id.* at A6 n.3). Two judges on the panel separately stated that the requirement should at some point be reconsidered en banc (*id.* at A7). In light of the division among the circuits on the issue,[2] this Court granted the petition for a writ of certiorari on March 21, 1988.

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[1] The district court had also relied on alternative grounds to dismiss parts or all of the complaint. Those rulings were appealed but were not addressed by the court of appeals. Pet. App. A6 & n.4.

[2] No other court of appeals has adopted the Eighth Circuit's multiple-schemes requirement, and a number of circuits have expressly or implicitly rejected it, at least as a rigid rule. See *Roeder* v. *Alpha Industries, Inc.*, 814 F.2d 22, 31 (1st Cir. 1987); *United States* v. *Ianniello*, 808 F.2d 184, 192 (2d Cir. 1986), cert. denied, No. 86-1579

SUMMARY OF ARGUMENT

The RICO pattern element does not require that the predicate offenses be committed in furtherance of multiple separate schemes. RICO nowhere uses the term "scheme," but instead contemplates that a pattern may be formed by multiple "acts," "threats," and "offenses." The Eighth Circuit's focus on "schemes" introduces a new concept into the statute that not only is hard to define but is out of place in many contexts: predicate crimes such as murder or robbery may form a clear "pattern" without any of the crimes being part of any "scheme."

The requirement of *multiple* schemes compounds the error. The requirement would enormously confuse, if not eliminate, the RICO conspiracy prohibition of Section 1962(d), since a single conspiracy would ordinarily encompass only a single "scheme." It would also severely undermine Section 1962(b), which plainly prohibits engaging in a pattern of racketeering activity to further a single scheme to take over a legitimate business. Finally, the requirement gets exactly backwards the intent of the "pattern" element, which was to ensure that the predicate crimes be tied together, not that they be separated.

We submit that a RICO pattern is present whenever the defendant's acts of committing the predicate offenses are not isolated or sporadic. This notion is reflected in the legislative history of RICO and is supported by Congress's

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(June 22, 1987); *Barticheck* v. *Fidelity Union Bank/First Nat'l State*, 832 F.2d 36, 39 (3d Cir. 1987); *International Data Bank, Ltd.* v. *Zepkin*, 812 F.2d 149, 154-155 (4th Cir. 1987); *R.A.G.S. Couture, Inc.* v. *Hyatt*, 774 F.2d 1350, 1355 (5th Cir. 1985); *Morgan* v. *Bank of Waukegan*, 804 F.2d 970, 975 (7th Cir. 1986); *Sun Savings & Loan Ass'n* v. *Dierdorff*, 825 F.2d 187, 192-193 (9th Cir. 1987); *Bank of America Nat'l Trust & Savings Ass'n* v. *Touche Ross & Co.*, 782 F.2d 966 (11th Cir. 1986).

definition of the same term in 18 U.S.C. 3575(e), which was enacted as part of the same statute that contained RICO and had similar aims. The pattern element does not require that the predicate crimes be similar in character, as Congress recognized that organized crime, which was the principal target of the statute, engages in a wide range of criminal activity. Rather, it is the defendant's acts in committing multiple predicate offenses, however dissimilar, that must not be isolated. That requirement is satisfied when the acts form a pattern by virtue of a connection to a common scheme, plan, or motive. More particularly, the requirement is satisfied when the acts are all committed in furtherance of an ongoing criminal enterprise, or are related in other ways to such a criminal enterprise, for such crimes present the threat of continuing harm to society that was the focus of Congress's concern in enacting RICO.

ARGUMENT

A. A RICO Pattern of Racketeering Activity Does not Require Multiple Separate Schemes

All four types of RICO violations, defined in 18 U.S.C. 1962(a)-(d), require proof of a "pattern of racketeering activity" as well as other elements. The Eighth Circuit, in this case and in prior cases, has held that the pattern element requires proof of multiple separate schemes. Under the Eighth Circuit's view, multiple acts of racketeering activity, if they are all part of a common scheme, cannot form the requisite "pattern." That construction of RICO is incorrect.

1. The multiple-schemes requirement "is not grounded in the statutory language of RICO." *United States* v. *Ianniello*, 808 F.2d 184, 192 n.16 (2d Cir. 1986), cert. denied, No. 86-1579 (June 22, 1987). See *Barticheck* v. *Fidelity Union Bank/First Nat'l State*, 832 F.2d 36, 39 (3d Cir.

1987) (multiple-schemes requirement "appears nowhere in the RICO statute"). Section 1961(5) provides that " 'pattern of racketeering activity' requires at least two acts of racketeering activity" committed within a ten-year period. Section 1961(1) in turn defines "racketeering activity" to mean (1) "any act or threat" that involves certain state-law crimes, including murder, kidnaping, gambling, arson, robbery, bribery, and dealing in narcotic or other dangerous drugs; (2) "any act" that is indictable under certain federal criminal laws; or (3) "any offense" that is punishable under certain federal securities-fraud, bankruptcy-fraud, or narcotics laws.

Those provisions speak solely in terms of "acts," "threats," and "offenses." They do not speak in terms of "schemes." The provisions contemplate that a series of acts, threats, or offenses—such as multiple murders or multiple gambling crimes or multiple narcotics offenses—can constitute a pattern. In many of those situations, the notion of "scheme" is simply out of place: individual predicate crimes such as murder, narcotics dealing, and gambling, or a series or such offenses that are sufficiently related to form a pattern, may not involve any "scheme" at all. And even when each of the predicate offenses is related to a "scheme" of some sort, there is no basis in the statutory language for eliminating RICO's coverage of multiple predicate offenses solely because all of the offenses are committed in furtherance of a single common scheme.

2. The Eighth Circuit's requirement of multiple separate schemes would severely undermine several of the prohibitions set forth in Section 1962. Thus, a violation of Section 1962(d), RICO conspiracy, requires proof of a single conspiracy to violate any of the other RICO provisions; yet, in the Eighth Circuit's view, those provisions

themselves require proof of more than one "scheme." Since a single conspiracy ordinarily would encompass a single scheme, the Eighth Circuit's requirement would make a RICO conspiracy violation impossible to prove, or else require linguistic contortions unwarranted by the statute. See Blakey, *Equitable Relief Under Civil RICO*, 62 Notre Dame L. Rev. 526, 538 n.37 (1987).

As the Second Circuit pointed out in *United States* v. *Ianniello*, 808 F.2d at 192, a multiple-schemes requirement also would virtually read Section 1962(b) out of the statute. Section 1962(b) prohibits acquiring or maintaining an interest in or control over an enterprise through a pattern of racketeering activity. It thus squarely prohibits engaging in a pattern of racketeering activity to further a single scheme of taking over or maintaining control of a single enterprise. An example of the kind of conduct that Congress intended to reach through Section 1962(b) is a series of acts of extortion designed to gain control of a legitimate business. Under the Eighth Circuit's view, however, no "pattern" would be present where the predicate acts are in furtherance of a single scheme to take over a single business, even if multiple extortions were committed for that purpose over a long period. That view would seem to exempt such extortionate conduct from prosecution under Section 1962(b), at least until the defendants undertook an additional scheme. That approach would gut one of the core provisions of RICO, the major purpose of which was to proscribe the infiltration of legitimate businesses by racketeering. See *United States* v. *Turkette*, 452 U.S. 576, 584, 591 (1981).[3]

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[3] Introducing the concept of "scheme" into RICO would also cause practical problems not contemplated by the statute. "Scheme" "is hardly a self-defining term" (*Bartlicheck*, 832 F.2d at 39). For example, in this case, it is hardly clear why petitioners' complaint should

3. In addition, the Eighth Circuit's multiple-schemes requirement gets the purpose of the RICO "pattern" requirement precisely backwards. The existence of a common scheme embracing the predicate acts, threats, or offenses actually supports rather than undermines a finding of the requisite pattern. To the extent that "pattern of racketeering activity" requires something more than two predicate acts, threats, or offenses standing alone, the additional requirement supplied by the term "pattern" is that the predicate acts, threats, and offenses, far from being separated into distinct schemes, must be tied together by some common element or theme so as not to be merely isolated or sporadic.

The evidence of Congress's intent in enacting RICO in 1970 supports this natural meaning, as this Court explained in *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 496 n.14 (1985). The Senate Committee (S. Rep. 91-617, 91st Cong., 1st Sess. 158 (1969)) stated that the pattern requirement was intended to exclude cases involving only "sporadic activity" and that, as a consequence, a pattern is formed by racketeering activity that exhibits "continuity plus relationship." Senator McClellan, the chief Senate sponsor, explained that a RICO pattern is not formed by "two widely separated and isolated criminal offenses," but requires a "relationship" between the predicate acts (116 Cong. Rec. 18940 (1970)). Representative Poff echoed that theme, explaining that RICO was "not aimed at the isolated offender" (*id.* at 35193).

The same idea is reflected in the Dangerous Special Offender Act, 18 U.S.C. 3575, which was enacted as part of

not be read as alleging, in addition to a single overall scheme to obtain continuing influence with the Public Utility Commission, multiple smaller schemes to obtain favorable treatment in several particular rate-setting votes over the six-year period covered by the complaint.

the same 1970 statute that contained RICO. Like RICO, the Dangerous Special Offender Act had organized crime as a central focus (*e.g.*, S. Rep. 91-617, *supra*, at 88; 116 Cong. Rec. 592 (1970) (remarks of Sen. McClellan)), and like RICO, it provided for special long sentences for certain persons based on their involvement in a "pattern" of criminal conduct.[4] Unlike RICO, however, the Dangerous Special Offender Act contained a detailed definition of the term "pattern": Congress stated that "criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events" (18 U.S.C. 3575(e)).

The use of the same term in a companion provision of the same statute strongly suggests that Congress intended the term to have the same meaning when used in RICO. The legislative history supports that view. See S. Rep. 91-617, *supra*, at 164 (the pattern requirement of Section 3575(e) "precludes the application of the provision to an isolated offense"); S. Rep. 91-617, *supra*, at 165 (acts must "bear relationships to one another"); H.R. Rep. 91-1549, 91st Cong., 2d Sess. 22 (1970); 116 Cong. Rec. 847 (1970) (remarks of Sen. Hruska) (Section 3575(e) "pattern" means "not an isolated example"). The inclusion of the definition in the Dangerous Special Offender Act, but not in RICO, does not reflect an intention to give the term "pattern" different meanings in the two statutes. Rather, the definition of "pattern" in the Dangerous Special Offender Act was added by the House pursuant to a sug-

[4] The Dangerous Special Offender Act was repealed effective November 1, 1987. Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 212(a)(2), 98 Stat. 1987; Sentencing Reform Amendments Act of 1985, Pub. L. No. 99-217, § 4, 99 Stat. 1728.

gestion from the American Bar Association that was designed to provide "further elaboration" and "increased specificity." 116 Cong. Rec. 35202 (1970).

These materials, which nowhere mention "schemes," indicate that, to the extent Congress chose the term "pattern" to restrict the scope of RICO, it did so simply to ensure that the commission of several predicate acts, threats, or offenses, each isolated from and having nothing to do with the others, would not trigger the special penalties of RICO. The aim was to focus the statute on groups of predicate crimes that are connected in some way. It is certainly a sufficient condition for a case to be within that focus that the predicate crimes are all committed in furtherance of a single common scheme, because such crimes are not isolated. The Eighth Circuit's reading of "pattern" to demand *separate* schemes, by requiring that the predicate crimes be disconnected, stands the "pattern" requirement on its head.[5]

4. Finally, because the multiple-schemes requirement "would exempt from RICO liability defendants who engage in only a single unlawful scheme, however extensive and injurious," the requirement "is plainly inconsistent with the purposes of the statute." *Barticheck,* 832 F.2d at 39. See *Morgan* v. *Bank of Waukegan,* 804 F.2d 970, 975 (7th Cir. 1986). "[T]he RICO statute was intended to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots." *Russello*

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[5] Indeed, Justice Powell, in his dissent in *Sedima, S.P.R.L.* v. *Imrex Co.,* 473 U.S. 479, 528 (1985), would have read RICO's "pattern" element as *requiring* that the predicate crimes "be part of some common scheme." We do not think a common scheme is a necessary condition, because, as we have explained, the notion of "scheme" does not appear in the statute and is out of place in many contexts. But we agree that the existence of a common scheme is a sufficient condition to establish that the predicate crimes form the required pattern.

v. *United States,* 464 U.S. 16, 26 (1983). Congress expressed the intention that RICO be used to attack the full range of organized crime's activities (18 U.S.C. 1961 note; Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 1, 84 Stat. 922-933), and it stated that RICO's provisions "shall be liberally construed to effectuate its remedial purposes" (18 U.S.C. 1961 note; § 904(a), 84 Stat. 947). See generally *Sedima,* 473 U.S. at 497-498; *Russello,* 464 U.S. at 26-29; *Turkette,* 452 U.S. at 586-589. As is most evident in Section 1962(b), which proscribes even a single scheme to take over a single enterprise through multiple predicate crimes, RICO properly covers a wide variety of situations where multiple crimes might be found to constitute a "single scheme." *E.g., United States* v. *Garver,* 809 F.2d 1291, 1300 (7th Cir. 1987); *Ianniello,* 808 F.2d at 189-192; *United States* v *Caporale,* 806 F.2d 1487, 1502 n.20 (11th Cir. 1986), cert. denied, No. 86-1713 (June 26, 1987); *United States* v. *Boffa,* 688 F.2d 919, 934 (3d Cir. 1982), cert. denied, 460 U.S. 1022 (1983); *United States* v. *Brooklier,* 685 F.2d 1208, 1217 (9th Cir. 1982), cert. denied, 459 U.S. 1206 (1983); *United States* v. *Colacurcio,* 659 F.2d 684, 688 n.4 (5th Cir. 1981), cert. denied, 455 U.S. 1002 (1982). The Eighth Circuit's view would gravely impair RICO's ability to combat that activity, without any justification in the language or legislative history of the statute.

B. A RICO "Pattern" Is Present Whenever the Commission of Each Predicate Offense Is not Isolated from the Commission of the Others

In deciding this case, there is no need for this Court to adopt a general definition of the term "pattern" intended to resolve issues other than the one presented here. The analysis above is sufficient to show that the Eighth

Circuit's multiple-schemes rule is incorrect, and to the extent that other questions of interpretation may arise, the Court should await cases that present them. Nevertheless, because the resolution of this case requires some discussion of the meaning of the phrase "pattern of racketeering activity," and because of the potential effect on federal RICO prosecutions of any opinion this Court files in this case, we briefly discuss several additional aspects of the meaning and application of RICO's pattern element.

1. We note at the outset two points that must inform the interpretation of the RICO pattern element. First, "RICO is to be read broadly. This is the lesson not only of Congress' self-consciously expansive language and overall approach, see *United States* v. *Turkette*, 452 U.S. 576, 586-587 (1981), but also of its express admonition that RICO is to 'be liberally construed to effectuate its remedial purposes,' Pub. L. 91-452, § 904(a), 84 Stat. 947." *Sedima*, 473 U.S. at 497-498. See also *Russello*, 464 U.S. at 26-29. Second, proof of a "pattern" establishes only one element of a RICO violation. In particular, under all four subsections of Section 1962, an "enterprise" must also be proved; and while "the proof used to establish these separate elements may in particular cases coalesce," the enterprise and the racketeering pattern are distinct elements, with the former demanding proof of an ongoing organization that functions as a continuing unit (*Turkette*, 452 U.S. at 583). Therefore, even a liberal construction of the term "pattern," as called for by RICO and this Court's decisions, does not convert every series of related criminal acts into a RICO violation.[6]

[6] Insofar as criminal prosecutions under RICO are concerned, it is relevant to note that all RICO prosecutions must be approved by the Organized Crime and Racketeering Section of the Criminal Division of the Department of Justice (see *United States Attorneys' Manual* § 9-110.101 (Mar. 9, 1984)) and that the Department has established a general policy against charging multiple predicate acts based on a single episode of criminal conduct. The establishment of that policy as a matter of prosecutorial discretion, of course, does not restrict the scope of the statute. Moreover, partly because of the difficulty of defining the concept of a criminal "episode," exceptions to the policy are sometimes recognized.

2. The Senate Report on the bill that became the RICO statute stated that it is the factor of "continuity plus relationship" that "combines to produce a pattern." S. Rep. 91-617, *supra*, at 158; see *Sedima*, 473 U.S. at 496 n.14. There is, however, nothing talismanic in the phrase "continuity plus relationship." Neither the Senate Report nor the *Sedima* footnote that quotes it suggests that the phrase is anything but an attempt to characterize a statutory concept that is difficult to define with great precision.

Congress did not intend anything narrower by the concept of "pattern" than that the commission of the predicate offenses must not be "isolated" or "sporadic." See *Sedima*, 473 U.S. at 496 n.14. The same idea is captured in Congress's definition of "pattern" in 18 U.S.C. 3575(e), which could appropriately be borrowed as an explanation of the term in RICO. The references to "continuity plus relationship" and the "threat of continuing activity" in the Senate Report require no more restrictive a view.

The Senate Report did not use the phrase "continuity plus relationship" to impose a requirement that the predicate crimes form an uninterrupted chain of similar events proximate in time. Any such requirement would be flatly contrary to Section 1961(1) and (5), which expressly contemplates that a wide variety of predicate offenses committed as much as ten years apart can form a pattern.

Rather, the Senate Committee used the notion of "continuity plus relationship" in order to make clear that what must be related in some fashion is not the intrinsic features of the predicate crimes but the defendant's acts in committing those crimes. For example, two extortions or two mail frauds might be said to have a "relationship" by virtue of the similarity of the crimes but still be "isolated" acts of the defendant and hence outside the intended reach of RICO because they lack "continuity." Continuity would be supplied, however, if the acts were related in some way that reflected a risk of continuing harm to society – for example, if the crimes were committed as part of the ongoing activities of a criminal enterprise. *United States* v. *Ianniello*, 808 F.2d at 192. It was precisely that threat that Congress had in mind when it wrote the broad definition of "pattern" in Section 3575(e).[7]

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[7] A RICO pattern does not require separate proof that the defendant presents a "threat of continuing [criminal] activity" (S. Rep. 91-617, *supra*, at 158) in the future: the pattern itself establishes the threat. As the Third Circuit explained in the civil RICO context, there is no "requirement of 'open-endedness.' At the very least, such a requirement would produce anomalous results. This approach would allow a party to maintain a RICO claim if he brought suit before the unlawful scheme had attained its objective; in such a case the scheme would presumably be considered open-ended. This same interpretation, though, would deny a RICO cause of action in a case where the scheme had fully accomplished its goal. Yet it is the completed scheme that inflicts the greater harm and more strongly implicates the remedial purposes of RICO." *Barticheck*, 832 F.2d at 39. Similarly in the criminal context: a defendant whose past acts form a pattern of racketeering activity is not rendered immune from RICO prosecution because there is no separate indication that he will continue his criminal activity.

In addition, the RICO pattern element contains no requirement that the predicate crimes be separated by any particular interval in time. There is no basis, for example, for reading RICO to distinguish an individual who commits three murders in rapid succession, all to serve

3. Although similarity in the character of the predicate crimes (*e.g.*, all are extortions or all are mail frauds) can help establish the requisite pattern, RICO does not require it. Limiting the term "pattern" to crimes of similar character would undermine the express congressional purpose to attack organized crime in all of its varied activities. See *Sedima*, 473 U.S. at 487, 488; *Russello*, 464 U.S. at 26; *Turkette*, 452 U.S. at 588-590. Congress recognized that organized crime engages in "diversified" activities such as "syndicated gambling, loan sharking, the theft and fencing of property, the importation and distribution of narcotics and other dangerous drugs, and other forms of social exploitation" (18 U.S.C. 1961 note (Statement of Findings and Purpose)). The broad range of crimes included in Section 1961(1)'s definition of "racketeering activity" reflects that recognition. And the legislative history is replete with statements indicating congressional awareness that organized crime groups engage in a wide variety of criminal conduct. See, *e.g.*, S. Rep. 91-617, *supra*, at 41 ("gambling, narcotics, loan sharking, or other illegal businesses"); 116 Cong. Rec. 586 (1970) (remarks of Sen. McClellan) ("[s]yndicated gambling, the importation * * * and distribution of narcotics, and loan sharking"); *id.* at 591 (remarks of Sen. McClellan) ("narcotics, loan sharking, prostitution, and bootlegging"); *id.* at 601 (remarks of Sen. Hruska) ("gambling, narcotics, and loansharking"; "robbery, larceny, and arson"); *id.* at 606-607 (remarks of Sen. Byrd ("[s]yndicated gambling,

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the goal of furthering a criminal enterprise, from one who commits them over the course of several days: in either event, such multiple offenses are sufficient to constitute a pattern. See *United States* v. *Watchmaker*, 761 F.2d 1459, 1463-1464 (11th Cir. 1985), cert. denied, 474 U.S. 1101 (1986); *United States* v. *Salerno*, appeal pending, No. 87-1075 (2d Cir.).

loan sharking, prostitution, narcotics trafficking, and similar illicit enterprises"); *id.* at 819 (remarks of Sen. Scott) ("gambling, loan sharking, narcotics, prostitution, and other forms of vice")[8]

Against the backdrop of Congress's sweeping aim to combat organized crime, RICO cannot be read to exclude an individual who commits a number of predicate crimes in furtherance of an organized criminal enterprise simply because the acts are dissimilar in nature, methods of commission, or victims. A restrictive construction of the "pattern" element would strike at the heart of Congress's concern in enacting RICO, which was clearly designed to reach the organized-crime figure who engages in a pattern of criminal conduct that includes, for example, some bribery, some extortion, some loansharking, some narcotics dealing, and some murder. All such conduct should be chargeable as part of the required pattern; there is no

[8] See also 116 Cong. Rec. 952 (1970) (remarks of Sen. Thurmond); *id.* at 962 (remarks of Sen. Murphy); *id.* at 970 (remarks of Sen. Bible); *id.* at 971 (remarks of Sen. Williams); *id.* at 18913, 18937 (remarks of Sen. McClellan); *id.* at 35199 (remarks of Rep. Rodino); *id.* at 35199-35200 (remarks of Rep. St Germain); *id.* at 35206 (remarks of Rep. Kleppe); *id.* at 35211 (remarks of Rep. Kyl); *id.* at 35216 (remarks of Rep. McDade); *ibid.* (remarks of Rep. Donohue); *id.* at 35300 (remarks of Rep. Mayne); *id.* at 35303 (remarks of Rep. Railsback); *id.* at 35312 (remarks of Rep. Brock); *id.* at 35319 (remarks of Rep. Anderson); *id.* at 35321 (remarks of Rep. Price); *id.* at 35326 (remarks of Rep. Vanik); *id.* at 35328 (remarks of Rep. Meskill); *Hearings on Measures Relating to Organized Crime Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 108 (1969) (statement of Attorney General Mitchell); H.R. Rep. 1574, 90th Cong., 2d Sess. 5 (1968); *President Johnson's Message on the Challenge of Crime to Our Society*, H.R. Doc. 250, 90th Cong., 2d Sess. 11 (1968).

warrant for requiring that there be two instances of a particular type of crime and restricting the pattern charged to only one such type. Not surprisingly, the courts have not adopted any such construction, but have consistently recognized that a RICO pattern may be formed by predicate crimes that are not intrinsically similar. See, *e.g.*, *United States* v. *Persico*, 832 F.2d 705, 708-709 (2d Cir. 1987) (predicate crimes included loansharking, gambling, bribery, labor payoffs, and embezzlement); *United States* v. *Ruggiero*, 754 F.2d 927, 929-930 (11th Cir.), cert. denied, 471 U.S. 1127 (1985) (gambling, bribery, and distribution of narcotics); *United States* v. *Ruggiero*, 726 F.2d 913, 915-918 (2d Cir.), cert. denied, 469 U.S. 831 (1984) (conspiracy to murder, narcotics distribution, conducting an illegal gambling business, conspiracies to rob, and attempted robbery); *United States* v. *Riccobene*, 709 F.2d 214, 216-220 (3d Cir.), cert. denied, 464 U.S. 849 (1983) (gambling, mail fraud, wire fraud, and extortionate credit transactions); *United States* v. *Massino*, 605 F. Supp. 1565, 1569, 1571 (S.D.N.Y. 1985) (*e.g.*, conspiracies to murder, obstruction of justice, and conspiracy to rob); *United States* v. *Santoro*, 647 F. Supp. 153, 156-157, 174-178 (E.D.N.Y. 1986) (extortion, labor payoffs, and mail fraud). See also *Turkette*, 452 U.S. at 579 ("group of individuals associated in fact for the purpose of illegally trafficking in narcotics and other dangerous drugs, committing arsons, utilizing the United States mails to defraud insurance companies, bribing and attempting to bribe local police officers, and corruptly influencing and attempting to corruptly influence the outcome of state court proceedings").[9] The standard jury in-

[9] See also *United States* v. *Coonan*, 839 F.2d 886, 887 (2d Cir. 1988); *United States* v. *Tom*, 787 F.2d 65, 67 (2d Cir. 1986); *United*

struction also reflects this view. See E. Devitt, C. Blackmar & M. Wolff, *Federal Jury Practice and Instructions: Civil and Criminal* § 56.23, at 807-808 (3d ed. Supp. 1987) ("it is not necessary that the two acts found be of the same kind, or nature").

4. As we have explained, the thread of continuity needed to tie together the commission of predicate crimes so that they form a pattern is present at least when, in the words of the standard jury instruction, each predicate crime is "connected with the other by some common scheme, plan or motive so as to constitute a pattern" (E. Devitt, C. Blackmar, & M. Wolff, *supra,* § 56.23, at 807-808). Thus, a common scheme, plan, or motive to benefit or further a criminal enterprise is certainly a sufficient basis for finding that predicate crimes constitute a pattern. *E.g., United States* v. *Ianniello*, 808 F.2d at 192 ("common purpose of furthering a continuing criminal enterprise with which the person is associated"); *United States* v. *Thevis*, 665 F.2d 616, 625 (5th Cir.), cert. denied, 456 U.S. 1008 (1982); *United States* v. *Phillips*, 664 F.2d 971, 1011-1012 (5th Cir. 1981), cert. denied, 457 U.S. 1136 (1982). The thread of continuity, and hence the required pattern, is also present where predicate crimes are com-

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States v. *Manzella*, 782 F.2d 533, 536 (5th Cir.), cert. denied, 476 U.S. 1123 (1986); *United States* v. *Paone*, 782 F.2d 386, 388-390 (2d Cir. 1986), cert. denied, No. 85-1883 (Oct. 14, 1986); *United States* v. *Love*, 767 F.2d 1052, 1055-1056 (4th Cir. 1985), cert. denied, 474 U.S. 1081 (1986); *United States* v. *Watchmaker*, 761 F.2d 1459, 1463-1464 (11th Cir. 1985), cert. denied, 474 U.S. 1101 (1986); *United States* v. *Hawkins*, 681 F.2d 1343 (11th Cir.), cert. denied, 459 U.S. 994 (1982); *United States* v. *Kabbaby*, 672 F.2d 857, 859 (11th Cir. 1982); *United States* v. *Stratton*, 649 F.2d 1066, 1070-1074 (5th Cir. 1981); *United States* v. *Diecidue*, 603 F.2d 535, 539-542 & n.1 (5th Cir. 1979), cert. denied, 445 U.S. 946 (1980); *United States* v. *Elliott*, 571 F.2d 880, 884-900 (5th Cir.), cert. denied, 439 U.S. 953 (1978).

mitted that in fact benefit an ongoing criminal enterprise (*e.g., United States* v. *Killip*, 819 F.2d 1542, 1549-1550 (10th Cir. 1987), cert. denied, No. 87-5221 (Oct. 5, 1987) and No. 87-5621 (Dec. 14, 1987); *United States* v. *Ellison*, 793 F.2d 942, 950 (8th Cir. 1986), cert. denied, No. 86-5484 (Nov. 3, 1986); *United States* v. *Zang*, 703 F.2d 1186, 1194 (10th Cir. 1982), cert. denied, 464 U.S. 828 (1983)), where such an enterprise made possible or facilitated the commission of the predicate crimes (*e.g., United States* v. *Horak*, 833 F.2d 1235, 1239-1240 (7th Cir. 1987); *United States* v. *Robilotto*, 828 F.2d 940, 947-948 (2d Cir. 1987), cert. denied, No. 87-963 (Jan. 11, 1988); *United States* v. *Killip*, 819 F.2d at 1549; *United States* v. *Cauble*, 706 F.2d 1322, 1333 n. 24, 1341 (5th Cir. 1983), cert. denied, 465 U.S. 1005 (1984)), or where the predicate crimes were the defendant's way of participating in such an enterprise (*e.g., United States* v. *Conn*, 769 F.2d 420, 424-425 (7th Cir. 1985); *United States* v. *Provenzano*, 688 F.2d 194, 199-200 (3d Cir.), cert. denied, 459 U.S. 1071 (1982); *United States* v. *Elliott*, 571 F.2d 880, 899-900 (5th Cir.), cert. denied, 439 U.S. 953 (1978)). In these and other ways, the defendant's commission of predicate crimes can form the required pattern by virtue of their relation to a criminal enterprise.[10]

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[10] We do not suggest that the mere fact that several similar crimes are all related in some way to a legitimate enterprise makes a pattern of those crimes. When the crimes are related (as described in text) to a *criminal* enterprise, however, that fact supplies the required element of continuity among the defendant's criminal acts. Just as this Court recognized in *Turkette* that proof of a criminal enterprise and the pattern of racketeering activity may coincide without the two elements being equated (452 U.S. at 583), the fact that the enterprise in certain cases helps establish the pattern in no way equates the two elements or makes one of them redundant.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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Petitioners,

v.

NORTHWESTERN BELL TELEPHONE COMPANY, a subsidiary of U.S. WEST, A. B. C. individually and D. E. F. as corporations, and other unnamed Co-conspirators,

Respondents.

On Writ of Certiorari to the Court of Appeals for the Eighth Circuit

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No. 87-1252

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Petitioners,

v.

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Respondents.

On Writ of Certiorari to the Court of Appeals for the Eighth Circuit

BRIEF FOR AMICI CURIAE IN SUPPORT OF RESPONDENT

INTEREST OF AMICI CURIAE

This brief is submitted on behalf of the States of Arizona, California, Connecticut, Idaho, Michigan, New

Jersey, New Mexico, North Carolina, Oregon, Texas, Washington, West Virginia, Wisconsin, and Wyoming.*

In 1970, Congress enacted the Organized Crime Control Act, Title IX of which is known as "RICO." 18 U.S.C. §§ 1961-68 (1982). Since then, twenty-seven states, including Arizona, have followed Congress' lead by adopting similar, but not identical legislation.[1] These states have employed this legislation in criminal prosecutions against a wide variety of illegal conduct.[2] Both state governments and private plaintiffs have also utilized state RICO legislation in civil litigation.[3] Although these states adopted legislation analogous to, but different from, Title IX, Federal RICO plays a vital role in interpreting the state statutes.[4]

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* The assistance in the preparation of this brief of Professor G. Robert Blakey, O'Neill Professor of Law, Notre Dame Law School, Jennifer Ann Walecki (Notre Dame '89) and Joseph P. Shannon (Notre Dame '88) is hereby acknowledged.

[1]For a detailed comparative analysis of the Federal and state legislation, see Blakey and Cessar, *Equitable Relief under Civil RICO*, 62 Notre Dame L. Rev. 526, 596 (1987) (hereinafter *Equitable Relief*).

[2]See, e.g., *Carlson* v. *State*, 405 S.2d 173, 174 (Fla. 1981) (house of ill fame); *Dorsey* v. *State*, 402 S.2d 1178, 1180 (Fla. 1981) (drugs); *State* v. *Whiddon*, 384 S.2d 1269, 1270 (Fla. 1980) (theft, burglary, arson and arson to defraud); *Moorehead* v. *State*, 383 S.2d 629, 630-31 (Fla. 1980) (auto theft).

[3]See, e.g., *Arizona ex rel. Corbin* v. *Pickrell*, 136 Ariz. 589, 591, 667 P.2d 1304, 1306 (1983) (securities fraud); *Banderas* v. *Banco Central del Ecuador*, 461 S.2d 265 (Fla. Dist. Ct. App. 1985) (foreign exchange fraud).

[4]See, e.g. *Baines* v. *Superior Court*, 688 P.2d 1037, 1040 (Ariz. Ct. App. 1984) ("[i]n the absence of any Arizona cases, we will look to federal decisional law for guidance"); *Roash*

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Distressingly, however, decisions by lower Federal courts demonstrate a distinct hostility toward the use of civil RICO.[5] State RICO defendants use the decisions of the Federal courts to challenge state legislation in an attempt to narrow improperly the scope of the independent state statutes.[6] In the context of Federal litigation

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v. *State*, 413 S.2d 15, 20-21 (Fla. 1982) (constitutionality of RICO-type civil remedies upheld relying on Federal decisions); *Moorehead*, 383 S.2d at 630-31 (constitutionality of "pattern" in Florida RICO statute upheld relying on Federal decisions).

The jurisprudence that directs this course of interpretation is familiar. It is reflected, for example, in the law of Colorado. When the General Assembly adopts "substantially" the provisions of an act from another jurisdiction, it "is presumed to have intended that such statute should receive by the [Colorado] courts . . . the same construction given it by the courts of [the other jurisdiction] prior to its adoption . . . ." *Hoen* v. *District Court in and for the County of Arap*, 412 P.2d 428, 431 (Colo. 1966). Subsequent decisions are of "persuasive value only." *Boise-Payette Lumber Co.* v. *Longwedel*, 295 P.2d 791, 792 (Colo. 1930). Similar language is to be read similarly. *People* v. *Wahl*, 716 P.2d 123, 128 (Colo. 1986). But where "the Colorado approach is significantly different," limitations found in the "model act" should not be read into Colorado legislation. *People* v. *Wheatridge Poker Club*, 509 P.2d 324, 327 (Colo. 1977). Colorado's jurisprudence reflects general jurisprudence. *See, e.g., Jensen* v. *Intermountain Health Care, Inc.*, 679 P.2d 903, 904-05 (Utah 1984); *In Re Eaton's Estate*, 170 Wash. 280, 281, 16 P.2d 433, 434 (1932).

[5]*See generally*, Horn, *Judicial Plague Sweeps United States Resultorientitis' Infects Civil RICO Decisions*, 5 Nat'l L.J. May 23, 1983, at 31, col. 1. Indeed, prior to this Court's decision in *Sedima S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479 (1985), sixty-one per cent of the reported civil RICO decisions were dismissed on motions of the defendants. *Equitable Relief* at 534. Since *Sedima*, the dismissal rate has been fifty-one percent; forty percent of them have relied on "pattern" grounds. *Id.* at 620. *See infra* n.29.

[6]*See, e.g., Arizona ex rel. Corbin*, 136 Ariz. at 596, 667 P.2d at 1311 (distinct injury limitation rejected, but urged based on

(Continued on following page)

with pendent state claims, Federal courts are also unjustifiably reading limitations into state legislation not supported by the text or appropriate policy considerations, thus frustrating the particular designs of each state's statute.[7] Equally significant, lower Federal courts are reading the text of state RICO legislation—despite differences in language and policy—in a fashion identical to Federal RICO, most often relying on "pattern" grounds for dismissal of complaints.[8] Courts "are not at liberty to imply . . . condition[s] which . . . [are] opposed to the explicit terms of . . . [a] statute . . . To [so] hold . . . is not to construe the . . . [statute] but to amend it." *Fedorenko v. United States*, 449 U.S. 490, 513 (1981) (quoting *Detroit Trust Co. v. The Thomas Barlum*, 293 U.S. 21, 38 (1934)). Nor should courts fail to recognize the differences in text and policy between Federal and state legislation.

(Continued from previous page)

Federal decisions); *Banderas*, 461 S.2d at 270 (organized crime limitation rejected; "garden variety" fraud exclusion rejected, but urged, citing *Sedima S.P.R.L. v. Imrex, Inc.*, 741 F.2d 482 (2d Cir. 1984), *rev'd*, 473 U.S. 479 (1985)).

[7]*See, e.g., Plains Resources, Inc. v. Gable*, Civil No. 83-JM-2145 (D. Colo. 1984) (organized crime limitation read into Federal and Colorado RICO statutes), *rev'd*, 782 F.2d 883, 887 (10th Cir. 1986) (relying on *Sedima*).

[8]*See, e.g., J.G. Williams v. Regency Properties Ltd.*, 672 F. Supp. 1436, 1442-43 (N.D. Ga. 1987) (Georgia RICO "pattern" dismissed, since like Federal RICO); *Michelson v. Merrill Lynch Pierce Fenner & Smith*, 669 F. Supp. 1244, 1250 (S.D.N.Y. 1987) (New Mexico RICO "pattern" not dismissed, since like Federal RICO); *Behunin v. Dow Chemical Co.*, 650 F. Supp. 1387, 1390 (D.C. Colo. 1986) (Colorado RICO "pattern" dismissed, since like Federal RICO); *Cook v. Zions First Nat'l Bank*, 645 F. Supp. 423, 426 (D.C. Utah 1986) (Utah RICO "pattern" dismissed, since like Federal RICO); *Schnitzer v. Oppenheimer*, 633 F. Supp. 92, 99 (D.C. Ore. 1985) (Oregon RICO "pattern" dismissed, since like Federal RICO). *See infra* n.29.

Accordingly, Amici urge this Court to give to Federal RICO an appropriate construction on the issue of "pattern" and to provide appropriate guidance for the lower courts to use when undertaking the sensitive task of making the required independent analysis of state RICO statutes.

—o—

STATEMENT

For the statement of the facts and course of the legal proceedings below, the Court is respectfully directed to the briefs of the parties.

One issue is presented:

Whether the Petitioners have alleged a "pattern of racketeering activity" under RICO, 18 U.S.C. §§ 1961-68?

Amici urge this Court to answer this issue in the affirmative.

—o—

SUMMARY OF ARGUMENT

In 1970, Congress enacted RICO as Title IX of the Organized Crime Control Act. In *Sedima* this Court suggested that the Federal courts reexamine "pattern" within the context of Federal RICO. The result has been a series of conflicting decisions. An examination of the text, legislative history, and policy of Federal RICO indicates that "pattern" means a "design" that reflects "relationship" and "continuity." Different "designs" are possible depending on the different uses of the concept of "pattern" within RICO. Nothing in the text, legislative history, or policy of RICO justifies the adoption of a rigid multiple scheme limitation.

No matter how Federal RICO is read, the definition of "pattern" in state legislation is an independent question. The language of the Federal RICO statute is not identical with the language used by the twenty-seven states that followed Congress' lead by adopting similar RICO legislation. The RICO statute of each state has its own legislative history, text, and jurisprudence. This Court's explication of the Federal "pattern" requirement provides guidance to Federal courts on the interpretation of each state's RICO statute in cases in which such interpretation is presented. Although this case does not directly present such interpretation, Amici urge this Court to provide guidance that state RICO statutes must be read on their own merits and not automatically in a fashion identical to their Federal counterpart.

—o—

ARGUMENT

I

"PATTERN" IS ESTABLISHED WHERE ACTS ARE RELATED AND MANIFEST OR POSE A THREAT OF CONTINUITY WITHOUT REGARD TO THE PRESENCE OF MULTIPLE SCHEMES.

In 1970, Congress enacted RICO as Title IX of the Organized Crime Control Act. 18 U.S.C. §§ 1961-68 (1982). It was designed to provide a new weapon for the assault on organized crime. *Russello v. United States*, 464 U.S. 16, 26 (1983). The statute targeted but was not limited to, the infiltration of legitimate businesses by organized crime figures. *United States v. Turkette*, 452 U.S. 576, 590-91 (1981); *Russello*, 464 U.S. at 26, 28; *Sedima S.P.R.L. v. Imrex Co. Inc.*, 473 U.S. 479, 495 (1985). Indeed,

18 U.S.C. § 1962 made it unlawful for "any person" to violate its substantive provisions by engaging in a "pattern of racketeering activity" by, through, or against any "enterprise."[9] If a person violates RICO's provisions by engaging in the prohibited "pattern of racketeering activity,"[10] he has, in effect, engaged in "organized crime," and is appropriately subject to RICO's criminal and civil sanctions.[11] RICO is to be liberally construed. 84 Stat. 947 (1970). Its sanctions were designed to supplement, but not supersede, other Federal and state criminal and civil remedies. *Id.*

This Court's opinion in *Sedima* contained the now often cited footnote number 14, which stated, "the failure of Congress and the courts to develop a meaningful concept of 'pattern' . . . resulted in the extraordinary uses to which civil RICO . . . [had] been put . . ." 473 U.S. at 500. Ignoring the general teachings of this Court in

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[9]*Sedima*, 473 U.S. at 495. *See generally, United States v. Cauble*, 706 F.2d 1322, 1330 (5th Cir. 1983) ("enterprise criminality" consists of "all types of organized criminal behavior . . . [ranging] from single political corruption to sophisticated white-collar crime schemes to traditional Mafia-type endeavor") (quoting, Blakey and Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts Criminal and Civil Remedies*, 53 Temple L. Q. 1009, 1013-14 (1980), *cert. denied*, 465 U.S. 1005 (1984); Goldsmith, *RICO and Enterprise Criminality*, 88 Col. L. Rev. (1988).

[10]"Racketeering activity" is defined in 18 U.S.C. § 1961(1) to mean various forms of conduct in violation of listed Federal and state criminal statutes. It is not necessary, however, that a person be previously convicted of one of the listed offenses before the person can be found responsible under the criminal or civil provisions of RICO. *Sedima*, 473 U.S. at 490 n.8, 500 n.14.

[11]RICO's criminal sanctions include imprisonment, fine and forfeiture. 18 U.S.C. § 1963 (1982). RICO's civil sanctions include injunctions and treble damages. 18 U.S.C. § 1964 (1982).

Sedima, and narrowly focusing on footnote 14, the lower courts have continued to dismiss the majority of civil RICO cases filed, most often relying on "pattern" grounds. Conflicting circuit court decisions employ diverse and confusing uses of the concept of "pattern."[12] This jurisprudential confusion has been aptly termed "sheer bedlam."[13]

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[12]*Compare Bartecheck v. Fidelity Union Bank/First National State Bank*, 832 F.2d 36, 38-40 (3rd Cir. 1987) (multiple scheme test rejected; need not be open ended; multiple factors); *California Architectural Bldg. Products, Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1469 (9th Cir. 1987) (single episode limitation rejected); *Roeder v. Alpha Indus., Inc.*, 814 F.2d 22, 31 (1st Cir. 1987) (multiple scheme or episode limitation rejected; multiple factors must be considered); *United States v. Ianniello*, 808 F.2d 184, 189-93 (2d Cir. 1986) (multiple scheme limitation rejected; continuity for "pattern" may be found from continuing character of enterprise and open-ended nature of scheme); *Morgan v. Bank of Waukegan*, 804 F.2d 970, 974-77 (7th Cir. 1986) (multiple scheme limitation rejected; "pattern" may be found where series of discrete harms inflicted) *and Bank of American National Trust & Savings Ass'n v. Touche Ross Co.*, 782 F.2d 966, 987 (11th Cir. 1986) (different criminal episodes test rejected); *with Garbade v. Great Divide Mining & Milling Corp.*, 831 F.2d 212, 214 (10th Cir. 1987) (single discrete scheme not "pattern"); *HMK Corp. v. Walsey*, 828 F.2d 1071, 1073-74 (9th Cir. 1987) (single development scheme not "pattern"), *cert. denied*, 107 S. Ct. 706 (1988); *Superior Oil v. Fulmer*, 785 F.2d 252, 255-58 (8th Cir. 1986) (single scheme established relationship, but negates continuity for "pattern") *and Madden v. Gluck*, 815 F.2d 116 n.1 (8th Cir. 1987) (*Fulmer* "adhere[d] to" despite *Ianniello*). For an excellent analysis of "pattern" that precedes, but anticipates the holdings of *Bartecheck*, etc., *see* Note, *Reconsideration of Pattern in Civil RICO Offenses*, 62 Notre Dame L. Rev. 92 (1986) (cited with approval in *Sun Savings & Loan Ass'n v. Dierdorff*, 825 F.2d 187, 192 (9th Cir. 1987)). *See also Beck v. Manufacturers Hanover Trust Co.*, 820 F.2d 46, 50 (2nd Cir. 1987) (enterprise must have continuity); *Montesano v. Sea First Commercial Corp.*, 818 F.2d 423, 426 (5th Cir. 1987) (*Beck* followed).

[13]*Furman v. Cirrito*, 828 F.2d 898, 909 (2nd Cir. 1987) (Pratt, J. in dissent). For a detailed critique of "pattern," *see Equitable Relief* at 535 n.37.

Amici urge this Court to avoid the narrow approach of the lower courts and to adopt a straightforward definition of "pattern" within RICO.

Any effort to develop a meaningful definition of "pattern" ought to begin with the language of the statute. *Sedima*, 473 U.S. at 495 n.13; *Russello*, 464 U.S. at 20; *Turkette*, 452 U.S. at 580.[14] The statute says "activity." 18 U.S.C. § 1961(1) (1982). It does not say "schemes" or "episodes." The statute "requires" that the "activity" be composed of "at least two acts." 18 U.S.C. § 1961(5) (1982). RICO's text, therefore, limits, but does not define "pattern."[15] *Sedima*, 473 U.S. at 496, n.14 ("while two acts are necessary, they may not be sufficient"). Accordingly, "pattern" should be read in its ordinary or plain

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[14]The definition of "pattern" must serve six functions:

1. The definition of criminality (when an indictment *may* be returned);
2. A statement of a claim for relief (when an action *may* be brought);
3. The principal of claim preclusion (when an action *must* be brought);
4. The application of the statute of limitation (when, in whole or in part, it is *too late* to bring an action);
5. The scope of discovery before trial; and,
6. The admissibility of evidence at trial.

Any definition of "pattern" must be faithful to the text of the statute, its legislative history, and its purpose. In addition, the definition ought to meet two tests: it ought to work equally well on the civil and criminal sides of the statute, and it ought to work equally well in §§ 1962(a), (b) and (c).

[15]*See generally Helvering v. Morgan's, Inc.*, 293 U.S. 121, 125 n.1 (1934) (discussion of difference between "means" and "includes"); Blakey, *The RICO Civil Action in Context*, 58 Notre Dame L. Rev. 237, 241 n.16 (1982) (hereinafter *Civil Action*).

meaning, yet viewed within the context of the entire statute. *Sedima*, 473 U.S. at 489, 495 n.13; *Russello*, 464 U.S. at 21, 22-23; *Turkette*, 452 U.S. at 580, 582, 587. The ordinary or plain meaning of "pattern" is "design."[16] Obviously, a single kind of "design" is not required for all sections or all uses of the concept within each section.[17] Thus, the requirement of "pattern" is a standard, not a rule.[18]

The legislative history of the statute should also be examined. *Sedima*, 473 U.S. at 486; *Turkette*, 452 U.S. at 586. Neither the text nor the legislative history requires a "single scheme" or "multiple schemes" for a showing

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[16]The Oxford English Dictionary paraphrases "pattern" as "design" or "discernible form." *See* VII The Oxford English Dictionary 565-66 (1933) (thirteen uses are noted; number eight refers to "design"); III the Oxford English Dictionary 315 (1933) (definition number 8C: "An arrangement or order of things or activity in abstract sense; order or form discernible in things, actions, idea, situations, etc. Freq. with *of*, as *pattern of behavior* . . . and as second element with defining word.") (emphasis in original).

[17]*See RICO Revisited: An Advanced Seminar on the Latest Techniques in Civil Suits*, 157 (1987) ("Pattern" may be used in RICO violation in at least 240 different contexts [3 (sections) x 5 (kinds of enterprises) x 4 (kinds of predicate offenses) x 4 (roles in violations) = 240]."); *See* L. Wittgenstein, Philosophical Investigation 20 (2d ed. 1953) ("For a *large* class of cases—though not for all—in which we employ the word 'meaning' it can be defined thus: the meaning of a word is its use in the language.") (emphasis in original).

[18]*Morgan*, 804 F.2d at 976 ("The doctrinal requirement of pattern of racketeering activity is a standard, not a rule, and as such its determination depends on the facts and circumstances of the particular use with no one factor being necessarily determinative."); II R. Pound, Jurisprudence 124-29 (1959). *See also Nash v. United States*, 229 U.S. 373, 376 (1913) ("restraint of trade") (Holmes, J.) ("[T]he law is full of instances where a man's fate depends on . . . some matter of degree.")

of "pattern."[19] "Schemes" or "episodes" are not mentioned either.[20] In fact, the legislative history materials specifically point to only two goals that any definition of the concept of "pattern" ought to reflect: "relationship" and "continuity." *See, e.g.*, S. Rep. No. 91-617, 91st Cong., 1st Sess. 158 (1964). Their inclusion in the concept reflects a desire to target more than mere "sporadic activity." *Id.*

If such concepts as "scheme" or "episode" are relevant to a text-based approach to the concept of "pattern" that reflects the notion of "design," the concepts would have validity solely as *tests* for the presence of congressionally-mandated goals. For example, a single "episode" (defined to mean several acts, so closely related in time and placed that they may be fairly described as producing but a single harm will not carry with it the reality or the threat of continuity. *See, e.g., Schreiber Distrib. Co. v. Serv-Well Furniture Co., Inc.*, 806 F.2d 1393, 1399 (9th Cir. 1986) (diversion of single shipment of product not pattern). As such, no pattern will be present. Yet a "multiple scheme" or "multiple episode" test ought not to be elevated to a *judicially* imposed requirement that

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[19]*Compare United States v. Qaoud*, 777 F.2d 1105, 1106 (6th Cir. 1985) (single scheme not required: acts need only be related by enterprise), *cert. denied*, 106 S. Ct. 1499 (1986) *and* A.B.A. Criminal Justice Section, Comprehensive Perspective on Civil and Criminal RICO Legislation and Litigation: A Report of the RICO Cases Committee 36-37 (1985) (common scheme limitation rejected, since it would frustrate the application of RICO to conglomerates of crime); *Morgan*, 804 F.2d at 975 (single scheme not precluded; "otherwise . . . a single scheme would automatically escape RICO liability . . . untenable result.").

[20]*Ianniello*, 808 F.2d at 192 n.16 (no "clear legislative history" mandating multiple schemes).

would be *inflexibly* applied as a substitute for congressionally mandated elements.

The point is most clearly seen in the context of Sections 1962(b) and (d) of RICO. In construing "pattern," most of the lower courts have concentrated on Section 1962(c). *See, e.g., Superior Oil,* 785 F.2d at 255; *but see id.* at 255 and n.1 (§§ 1962(a), (b), and (c) "share in common" the "pattern" concept). Suppose, however, that the multiple scheme limitation were applied to Section 1962(b), which deals with the takeover of an enterprise, and which, all concede, represents the principal, albeit not exclusive, purpose of RICO. *See Russello,* 464 U.S. at 28; *Turkette,* 452 U.S. at 590-91. Should no pattern be found where the racketeering activity was engaged in pursuant to a single scheme, then Section 1962(b) will have been read out of the statute—or at least rewritten to prohibit *only* the acquisition of multiple enterprises. *Ianniello,* 808 F.2d at 192 ("requiring two schemes to establish pattern would effectively eleminate" § 1962(b)).[21] Such a result would be both "absurd" and "surprising." *Turkette,* 452 U.S. at 587. It is not what Congress intended. S. Rep. No. 91-617, 91st Cong., 1st Sess. 158 (1969) ("The infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective. It is this factor of continuity plus relationship which combines to produce a pattern.")

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[21] *See also Paul S. Mullin & Assoc., Inc. v. Bassett,* 632 F. Supp. 532, 541 (D. Del. 1986) ("[A]n attempt by a racketeering enterprise to infiltrate General Motors could involve countless acts. . . . One could argue, however, that [no pattern was] involved because only one company was subverted. Under this view, a 'pattern' would come into existence only after the same enterprise began to infiltrate Chrysler or Ford.").

Thus, to be successful, the takeover of a legitimate business—even though accomplished in the context of a "single scheme" or "single episode"—would "normally" require not only the act of takeover, but also a "threat" of continuing criminal activity to maintain its objective. Otherwise, the business could be reclaimed at any time. *See Morgan,* 804 F.2d at 975. ("To focus excessively on either continuity or relationship alone effectively negates the remaining prong.")

Similarly, requiring multiple schemes for "pattern" potentially conflicts with Section 1962(d) (conspiracy). A requirement of multiple schemes might defeat a single conspiracy charge. Conversely, a showing of a single conspiracy might preclude a finding a multiple schemes for "pattern."

One act does not make a pattern. *United States v. Joseph,* 781 F.2d 549, 554 (6th Cir. 1986). Nor do isolated acts. S. Rep. No. 91-617, 91st Cong., 1st Sess. 158 (1969) ("[O]ne 'isolated racketeering' activity . . . [is] insufficient . . . .") Nothing in the text or the legislative history of the statute indicates that continuity (or its threat) may *only* be found in, or inferred from, the racketeering activity itself. It is wholly consistent with the text and legislative history of the statute to find continuity in *any aspect of a violation* that relates to the racketeering activity. *Ianniello,* 808 F.2d at 190-91 (threat of continuity found from ongoing character of organized group). Con-

tinuity, too, should be tested *during* the "pattern," not after its termination.[22]

RICO is part of Title 18, the Federal criminal code. As such, "act" is best understood in the traditional sense of *actus reus* and *mens rea*. *United States v. Bailey*, 444 U.S. 394, 415 n.11 (1980) ("Congress in enacting criminal statutes legislates against a background of Anglo-Saxon common law. . . ."). When examining the "acts" that make up an alleged "pattern," no reason exists for focusing on a *purely* jurisdictional "act," that is, a mailing, a use of wire communication, or interstate or foreign transportation. *See e.g., Elliott v. Chicago Motor Club Ins.*, 809 F.2d 347, 350 (7th Cir. 1987) (mailings relating to same fraud not distinct for purpose of determining pattern); *cf. Cabbell v. United States*, 636 F.2d 246, 248-49 (8th Cir. 1980) (proper prosecutorial unit under § 2314 may ignore jurisdictional elements).

While "pattern" must be read consistently in criminal and civil litigation, the "acts" that constitute the "pattern" may differ. *Elliott*, 809 F.2d at 350 (quoting *Lipin Enterprises, Inc. v. Lee*, 803 F.2d 322, 325 (7th Cir. 1986) (Cudahy, J., concurring) ("a multiplicity of mailings does not reasonably translate directly into a 'pat-

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[22]*Marshall-Silver Construction Co., Inc. v. Mendel*, 835 F.2d 63, 66 (3rd Cir. 1987) ("poses or posed"); *Liquid Air Corp. v. Rogers*, 834 F.2d 1297, 1309 (7th Cir. 1987) ("duration of the predicate acts"); *Sun Savings*, 825 F.2d 194 n.5 (9th Cir. 1987); *City of New York v. Joseph L. Balkan, Inc.*, 656 F. Supp. 536, 545 (E.D.N.Y. 1987) (continuity measured between acts not at termination); *Louisiana Power & Light Co. v. United Gas Pipe Line Co.*, 642 F. Supp. 781, 810 (E.D. La. 1986) (would have continued if not caught).

tern' ")). *Compare Lipin Enterprises*, 803 F.2d at 325 (Cudahy, J.) ("It is not clear that the same analysis would be appropriate in cases involving other kinds of predicate acts [such as] arson."). The cause should focus on "act"—the *actus reus*—that inflicts discrete harm. *Morgan*, 804 F.2d at 975. Using this approach, a "pattern" may exist when at least two acts, which are "designed" or have "discernible form" in reference to themselves or to the enterprise occur, and which reflect continuity (or its threat), either by looking at the acts themselves (*e.g.*, many bribes paid over a period of time), the purpose for which they were committed (*e.g.*, obtaining, on a continuing basis, valuable rate consideration) or the enterprise itself (*e.g.*, a corporation, a public commission, or an on-going association of persons and entities). Under this approach, little doubt exists that the Petitioners in this appeal stated a "pattern"[23] in their complaint. The judgment of the Court of Appeals should be reversed.

II

PATTERN UNDER STATE LAW IS AN INDEPENDENT QUESTION

No matter how Federal RICO may be interpreted, crucial differences exist between Title IX and the definitions of

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[23]For parallel concepts, *see Henry v. Farmer City State Bank*, 808 F.2d 1228, 1237 (7th Cir. 1986) (municipal liability under 42 U.S.C. § 1983 (1982) ("[A] plaintiff must allege [under *Oklahoma City v. Tuttle*, 471 U.S. 808, 814 (1985)] a specific pattern or series of incidents that support the general allegations of custom or policy . . . ."); *United States v. Iron Workers Local 86*, 443 F.2d 544, 551-52 (9th Cir.) ("pattern or practice" prerequisite for an attorney general suit under Title VII: defined as "more than an isolated, sporadic incident, but is repeated routine of a generalized nature") (quoting 110 Cong. Rec. 14270 (1970)) (remarks of Sen. Hubert H. Humphrey), *cert. denied*, 404 U.S. 984 (1971).

"pattern" found in the individual state statutes that have pattern requirements. Although some states do not use "pattern" at all in their statutes, but instead rely on the more general concept of "racketeering activity,"[24] all state RICO statutes are vulnerable to unwarranted limitations imposed in Federal courts interpreting them. Analysis of state RICO statutes requires independent examination of their particular words and histories consistent with their rich variety and with the principles of federalism.

The selection of a limitation or a definition of the pattern concept differs among the states. New Jersey[25] follows Federal RICO, creating only a limitation, while Pennsylvania[26] says "refers." The statutes of the remaining states that require patterns say "means,"[27] thus providing an exact definition of "pattern."[28] It is, therefore, inappropriate to read Federal concepts (i.e., "scheme" or "episode") into these definitions, especially

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[24]See, e.g., *Poling* v. *Morgan*, 829 F.2d 882, 887 (9th Cir. 1987) (Arizona RICO). *See also, Hawaii Rev. Stat.* § 842 (1976); *N.D. Century Code* § 12:1-06.1 (Smith Supp. 1983).

[25]*N.J. Stat. Ann.* § 2C:41-1 (d) (1), (2) (West Supp. 1982) ("Pattern of racketeering activity" requires . . .).

[26]18 *Pa. Cons. Stat.* § 911(h) (Pardon 1983) ("Pattern of racketeering activity" refers . . .).

[27]See, e.g., *Nev. Rev. Stat.* § 207.390 (1983) ("Racketeering activity" means . . .); *Ohio Rev. Code* § 2923.31 (1986) ("Pattern of Corrupt Activity" means . . .); *Wis. Stat. Ann.* § 946.82 (West Supp. 1984-85) ("Pattern of racketeering activity" means . . .).

[28]See *supra* n. 15.

where the Federal concepts do not have textual support in the state statutes,[29] and particularly where these state

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[29]It is particularly inappropriate to use Federal jurisprudence on "multiple schemes" or "multiple episodes" developed *after* the effective date of a state statute to narrow a state statute. *See, e.g., Behunin v. Dow Chemical Co.*, 650 F. Supp. 1390 (D.C. Colo. 1986) (Kane, J.) ("pattern" under Colorado RICO "coincide[s] with the meaning of its Federal counterpart.")

In fact, before 1981, the effective date of the Colorado statute, RICO defense counsel made a major effort to exclude a "single episode" from Federal RICO. As a matter of law, it did not succeed. *See, e.g., United States v. Moeller*, 402 F. Supp. 49, 57-58 (D.C. Conn. 1975) (single episode limitation advocated under § (c) but rejected as inconsistent with precedent under § (b) thought to be controlling). As a matter of prosecutorial discretion, it did. *United States Attorney's Manual*, Title 9—Criminal Division § 9.110.340 (RICO prosecution not to be brought where only a single episode). In addition, the uniform holding in the Federal decisions prior to 1981 was that "two acts," not "two schemes," were all that was required to establish a "pattern." *See, e.g., United States v. Parness*, 503 F.2d 430, 441-42 (2nd Cir. 1974) ("pattern" requires "two acts," not "two schemes") *cert. denied*, 419 U.S. 1105 (1975)); *United States v. Weatherspoon*, 581 F.2d 595, 602 (7th Cir. 1978) (same); *United States v. Starnes*, 644 F.2d 673, 677-78 (7th Cir.), *cert. denied*, 454 U.S. 826 (1982) (same); *United States v. Calabrese*, 645 F.2d 1379, 1389 (10th Cir.) (same), *cert. denied*, 454 U.S. 831 (1981).

Prior to 1981 the Federal courts had held that if the prosecution could show a "common scheme or plan" involving multiple acts, a "pattern" was present. *United States v. Stofsky*, 409 F. Supp. 609, 614 (D.C. S.N.Y. 1973), *aff'd*, 527 F.2d 237 (2d Cir. 1975), *cert. denied*, 429 U.S. 819 (1976). Some interpreted this holding to mean that a "pattern" could *only* be found if there were a "common scheme or plan" linking the "acts." Later decisions definitively established that as long as the "acts" were related to the affairs of an enterprise, a "pattern" was present, regardless of whether a "common scheme or plan" existed. *United States v. Weisman*, 624 F.2d 1118, 1122 (2d Cir.), *cert. denied*, 449 U.S. 871 (1980) (citing *United States v. Elliott*, 571 F.2d 880 (5th Cir.), *cert. denied*, 439 U.S. 953 (1978)). Thus, at

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statutes, like their Federal counterpart, are to be liberally construed.[30]

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the time Colorado RICO was passed in 1981, it was possible to show "relationship" under Federal RICO solely through the enterprise concept. The Federal courts, in short, had neither imposed a requirement that the "acts" be related to one another, nor adopted a narrow concept of continuity requiring multiple schemes. Even a cursory examination of the language used to define "pattern" under the Colorado statute should have made it clear that its definition was "significantly different" from that of Federal RICO. *See Colo. Rev. Stat.* § 18-17-103 (Supp. 1984). As such, limitations on RICO judicially crafted in the Federal courts *since* 1981 should not have been read into the Colorado statute. *See supra* n.4.

The author of the *Behunin* opinion has been unusually candid about his personal feelings toward RICO. "RICO is just . . . a rather sloppily thought out kind of way to get the Mafia that every body jumps on so that they can have more fun with fraud." *In Re Dow Co. SaraBond Products Liability*, 666 F. Supp. 1466, 1470 (D.C. Colo. 1987) (Kane, J.). As such, "policy considerations" warrant the statute being "put to rest." *Id. Compare* 116 Cong. Rec. 35,204 (1970) (statements of Cong. Poff) ("no single measure [had] received more thorough consideration"); *Iannelli v. United States*, 420 U.S. 770, 789 (1975) ("carefully crafted piece of legislation") *with United States v. Turkette*, 452 U.S. 576, 587 (1981) ("there is no argument that Congress acted beyond its power . . . that being the case, the courts are without authority to restrict the applications of the statute.").

[30]The presence of a liberal construction clause is not unusual in state law. Such clauses had their origin in the codification movement of the 19th century. Edward Livingston suggested the rejection of the old common law rule of strict construction in the farsighted code he drafted for Louisiana between 1820 and 1825. 1 E. Livingston, Complete Works on Criminal Jurisprudence 231 (1873 ed.); 1 E. Livingston, *supra*, at 14. ("[A]ll penal laws whatever are to be construed according to the plain import of their words. . . ."). Livingston's suggestion for Louisiana was followed by David Dudley Field in his influential draft of codes of penal law and criminal procedure for New York. The Code of Penal Law 5 (1865 ed.) ("fair import"); The Code of Criminal Procedure of the State of New York 470-

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Federal RICO uses "acts" as its unit for counting for "continuity." 18 U.S.C. § 1961(1) (1982). The states, on the other hand, utilize a variety of concepts in their attempt to establish a similar "continuity" prong for

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71 (1850 ed.) (revised code to be given "liberal construction" as the old rule had no support in any "principle of substantial justice, and . . . [its] highest aim, practically considered, seem[ed] to be, to render that law inconsistent with its spirit and as a consequence, absurd and ridiculous"). Ultimately, Livingston's and Field's work formed the intellectual basis for the Federal Rules of Civil and Criminal Procedure. C. Wright & A. Miller, Federal Practice and Procedure § 104 (1969).

Judicial hostility to change through legislation was common in the 19th century. *See* J. Hurst, The Growth of American Law 186 (1950):

> [W]here [judges] were not ready boldly to declare [it] unconstitutional, [they were ready] to interpret it so restrictively as to narrow its effect.
>
> These factors found expression in the abstract canons of statutory interpretation . . . : strict construction of statutes in derogation of the common law; strict construction of penal statutes, or of legislation that imposed 'drastic' burdens, or of legislation that imposed special damages . . . .
>
> The effect was to put a primarily obstructive, if not destructive connotation on the process of statutory interpretation.

Legislatures reacted. "[I]t became standard practice in drafting statutes to insert a preamble stating broadly the purpose of the act and to close with a provision declaring that the statute should be liberally construed." D. Wigdor, Roscoe Pound: Philosopher of Law 174 (1974); *see* E. Patterson, Jurisprudence: Men and Ideas of the Law 421 (1953). In fact ,a majority of states have abolished the common law rule. *Civil Action*, at 237, 245, n.25 (1982). Judicial hostility, however, continues into the 20th century. *See, e.g. Sedima*, 473 U.S. at 529 (Powell, J.) (liberal construction applies only to criminal provisions); *Saine v. A.I.A., Inc.*, 582 F. Supp. 1299, 1305 (D.C. Colo. 1984) (same) (Kane, J.). Courts have recognized that strict construction is not of constitutional dimension. *See, e.g., Tarrant v. Ponte*, 751 F.2d 459, 466 (1st Cir. 1985).

"pattern." Colorado,[31] Illinois,[32] New York,[33] Pennsylvania[34] and Washington[35] follow Federal RICO by counting "acts." The remainder of "pattern" states expressly count "incidents,"[36] "episodes"[37] or "events,"[38] each of which is synonymous with "occurrence."[39] They reflect the position advocated by Judge Newman in *United States v. Moeller*[40] and codified by the guidelines of the Department of Justice[41] that more than one occurrence is required. This intent is most evident in the more recently

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[31]*Colo. Rev. Stat.* § 18-17-103 (Supp. 1984) ("Pattern of racketeering activity means engaging in at least two acts. . . .").

[32]*Ill. Rev. Stat.* ch. 56-Y2 § 1653(b) (Smith Hurd Supp. 1984-85) ("Pattern of narcotics activity means two or more acts. . . .").

[33]*NY Penal Code* § 460.10 (1986) ("Pattern of criminal activity means conduct engaged in by persons . . . constituting three or more criminal acts.").

[34]18 *Pa. Cons. Stat.* § 911(h) (Pardon 1983) ("pattern of racketeering activity refers to a course of conduct requiring two or more acts. . . .").

[35]*Wash. Rev. Code Ann.*, § 9A.82.010 (West Supp. 1986) ("Pattern of criminal profiteering activity means engaging in at least three acts. . . .").

[36]*See, e.g., Fla. Stat. Ann.*, § 772.02 (1986) ("Pattern of criminal activity means engaging in at least two incidents. . . .").

[37]*Utah Code Ann.* § 76-10-1602 (Smith Supp. 1985) ("Pattern of racketeering activity means engaging in at least two episodes of racketeering conduct.").

[38]*See, e.g., Wash. Rev. Code Ann.* § 9A.82.010 (West Supp. 1986) (" . . . not be isolated events. . .").

[39]V Oxford English Dictionary 152 (1933) (incident-French); III *id.* 245 (episode-Greek), 338-39 (event-Latin).

[40]402 F. Supp. 49, 57-58 (D.C. Conn. 1975), *cert. denied*, 429 U.S. 1039 (1977). *See supra* n.29.

[41]United States Attorney's Manual, Title 9—Criminal Division § 9-110.340 ("single criminal episode"). *See supra* n.29.

enacted statutes, which specifically preclude counting as separate occurrences those that are too closely related in point of time and place.[42] None of these states, however, exclude from "pattern" a "single scheme."[43] As in Federal RICO, the focus is on the conduct of people, not their state of mind, and these definitions do not lend themselves to a "semantical game of generalizing the illegal objective." *Montesano v. SeaFirst Commercial Corp.*, 818 F.2d 423, 426 (5th Cir. 1987) (Higginbothan, J.).

Federal RICO has included the "relationship" requirement in "pattern" through its legislative history. The states, on the other hand, use a variety of methods to deal with the factor of "relationship." New Mexico relates "incidents" solely by intent.[44] Pennsylvania re-

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[42]*See, e.g., Del. Code Ann.*, Title 11, § 1502 (1986); *N.Y. Penal Code*, § 460.10 (1986); *Ohio Rev. Code* § 2923.31 (1986); *Wis. Stat. Ann.*, § 946.82 (West Supp. 1984-85).

[43]On the other hand, New York (*N.Y. Crim. Proc.*, § 40.10(2) (1985) ("Criminal transaction" means conduct which established at least one offense, and which is comprised of two or more of a group of acts either (a) so closely related in point of time and circumstances of commission as to constitute a single criminal incident, or (b) constitute elements or integral parts of a single criminal venture")) and Florida (*Fla. Stat. Ann.*, § 772.02(4) (1986) ("For the purposes of this chapter, the term 'pattern of criminal activity' shall not include two or more incidents of fraudulent conduct arising out of a single contract or transaction against one or more related persons")) preclude a single "transaction" from constituting a "pattern." "Transactions" may be paraphrased as "the carrying on or completion of an action or *course* of action." XI Oxford English Dictionary 251 (1933) (emphasis added). It can, therefore, be read either narrowly or broadly. *Compare, Thomas v. Myers-Dickson Furniture Co.*, 479 F.2d 740, 746 (5th Cir. 1979), *with Dombalion v. Fox*, 88 Cal.App. 3rd 763, 765-67, 152 Cal.Rptr. 86, 87-88 (Ct. App., Div. 1 1979).

[44]*N.M. Stat. Ann.* § 30-42-1-3 (Michie Supp. 1980).

quires a "course of conduct."[45] Where the enterprise is a legitimate one, New York requires a common scheme or plan; if the enterprise is illegitimate, state of mind and association with the enterprise suffice.[46] Colorado, Delaware, and Ohio specify that any relationship to the affairs of the enterprise is enough to establish the "relationship" prong of "pattern."[47] The remaining "pattern" states require that the occurrences be interrelated,[48] yet none provide a definition of "interrelated." Connecticut, Oregon and Washington explicitly resolve this ambiguity by expressly including a "nexus" to the affairs of the enterprise as a form of "interrelation."[49]

Federal RICO requires "at least two acts" committed "within ten years" of one another. 18 U.S.C. § 1961(5) (1984). New York, Washington, and Wisconsin require three acts,[50] while Pennsylvania imposes no time limitation.[51] Tennessee requires that the acts be committed within two years of one another;[52] Connecticut, Florida,

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[45]18 *Pa. Cons. Stat.* § 911(h) (Pardon 1983).

[46]*N.Y. Crim. Proc.* § 40.10 (1985).

[47]38 *Colo. Rev. Stat.* § 17-18-103 (Supp. 1984); *Del. Code Ann. Title 11,* § 1502 (1986); *Ohio Rev. Code* § 2923.31 (1986).

[48]*See, e.g., Ill. Rev. Stat.* ch 56½ § 1653 (Smith Hurd Supp. 1984-1985).

[49]*Conn. Gen. Stat. Ann.* § 53-394 (West Supp. 1984); *Ore. Rev. Code Ann.* § 166.715 (1983); *Wash. Rev. Code Ann* § 9A. 82.010 (West Supp. 1986).

[50]*N.Y. Crim. Proc.* § 40.10 (1985); *Wash. Rev. Code Ann.* § 9A.82.010 (West Supp. 1986); *Wis. Stat. Ann.* § 946.82 (West Supp. 1984-85).

[51]18 *Pa. Cons. Stat.* § 911(h) (Pardon 1983).

[52]*Tenn. Code Ann.* § 93-1-1003 (1986).

Idaho, Georgia and North Carolina, four years;[53] Illinois, Indiana, Louisiana, Mississippi, Nevada, New Mexico, Oregon, Utah and Washington, five years;[54] Ohio, six years;[55] and Wisconsin, seven years.[56] The rest follow the Federal statute.[57]

Since the various state statutes substantially differ from their Federal counterpart, Federal courts interpreting the state statutes must pay close attention to the texts of the state statutes when faced with a state RICO claim. Neither crowded court dockets nor considerations of Federalism ought to play a role in the Federal judiciary's reading of state RICO legislation, whatever role such considerations may properly play in reading Federal statutes. *Compare, Patsy v. Florida Board of Regents,* 457 U.S. 496, 512 n.13 (1982) (burden on Federal courts "not sufficient to justify a judicial decision to alter [a] congressionally [drafted scheme]") *with Arizona ex rel. Corbin, v. Pickrell,* 136 Ariz. at 591, 667 P.2d at 1306

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[53]*See, Conn. Gen. Stat. Ann.* § 53-394 (West Supp. 1984); *Fla. Stat. Ann.* § 772.02 (1986); *Idaho Code* § 18-7803 (1981); *Ga. Code Ann.* § 16-14-3 (1983); *N.C. Gen. Stat.* § 75 D-3 (1986).

[54]*See, Ill. Rev. Stat.* ch 56½ § 1653(b) (Smith Hurd Supp. 1984-85); *Ind. Code Ann.* § 35-45-6-1 (Burns Supp. 1982); *La. Rev. Stat.* § 15-1351 (West 1985); *Miss. Code Ann.* § 97-43-1-3 (Lawyers Co-op 1986); *Nev. Rev. Stat.* § 207.390 (1983); *N.M. Stat. Ann.* § 30-42-1-3 (Michie Supp. 1980); *Ore. Rev. Code Ann.* § 166.715 (1983); *Utah Code Ann.* § 76-10-1602 (Smith Supp. 1985); *Wash. Rev. Code Ann.* § 9A.82.010 (West Supp. 1986).

[55]*Ohio Rev. Code* § 2923.31 (1986).

[56]*Wis. Stat. Ann.* § 946.82 (West Supp. 1984-85).

[57]*See, e.g., N.J. Stat. Ann.* § 2C:41-1(d)(1) (West Supp. 1982); *Del. Code Ann. Title 11,* § 1502 (1986); *Colo. Rev. Stat.* § 18-17-103 (Supp. 1984).

(concern for federalization of state cases is not a consideration in interpretation of Arizona RICO).

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CONCLUSION

Under a proper construction of "pattern," the Petitioners stated a claim for relief under Federal RICO. This Court ought, therefore, to reject the jurisprudence of the lower courts, which seems more intent on frustrating RICO than implementing it.[58] The judgment of the Court of Appeals should be reversed and the Petitioners' complaint reinstated.

Respectfully submitted,

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State of Arizona

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[58]More than 100 years ago, this Court noted, "it is easy, by very ingenious and astute construction, to evade the force of almost any statute, where a court is so disposed . . . [By such] a construction [it is possible to] annul [it] and render[] it superfluous and useless." *Pillow* v. *Roberts*, 54 U.S. (13 How.) 472, 476 (1851) (Grier, J.). *See also, Indian Towing Co. v. United States*, 350 U.S. 61, 68 (1955) (Tort Claims Act) (rejecting "distinctions so fine spun and capricious as to be almost incapable of being held in the mind for adequate formulation"). Such an approach to statutory construction, however, carries with it a heavy price. After a lifetime of study of the law, Dean Roscoe Pound concluded that such construction (1) "tend[ed] to bring the law into disrespect; (2) . . . subject[ed] the courts to political pressure; [and] (3) . . . invite[d] an arbitrary personal element in judicial administration." 3 Jurisprudence 488 (1959). It threatened, he found, to make "laws . . . worth little" and to "break down" the "legal order" itself. *Id.* at 490.

APPENDIX

Racketeer Influenced And Corrupt Organizations Statute (18 U.S.C. 1961-1968)

§ 1961. Definitions

As used in this chapter—

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (reltaing to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud, sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racke-

teering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), sections 2312 and 2313 (relating to interstate transportation of motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2320 (relating to white slave traffic), (C) any act which is indictvehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to whiteslave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States, or (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act;

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

§ 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any

part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

(a) Whoever violates any provision of section 1962 of this chapter shall be fined not more than $25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States, irrespective of any provision of State law—

(1) any interest the person has acquired or maintained in violation of section 1962;

(2) any—

(A) interest in;

(B) security of;

(C) claim against; or

(D) property or contractual right of any kind affording a source of influence over;

any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of in violation of section 1962; and

(3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962.

The court, in imposing sentence on such person shall order, in addition to any other sentence imposed pursuant to this section, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this section, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

(b) Property subject to criminal forfeiture under this section includes—

(1) real property, including things growing on, affixed to, and found in land; and

(2) tangible and intangible personal property, including rights, privileges, interests, claims and securities.

(c) All right, title, and interest in property described in subsection (a) vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be forfeited to the united States, unless the transferree establishes in a hearing pursuant to subsection (*l*) that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

(d)(1) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) for forfeiture under this section —

(A) upon the filing of an indictment or information charging a violation of section 1962 of this chapter and alleging that the property with respect to which the order is sought, would, in the event of conviction, be subject to forfeiture under this section; or

(B) prior to the filing of such an indictment or information, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that—

(i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and

(ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered:

Provided, however, That an order entered pursuant to subparagraph (B) shall be effective for not more than ninety days, unless extended by the court for good cause shown or unless an indictment or information described in subparagraph (A) has been filed.

(2) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when an information or indictment has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than ten days after the date on

which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time, and prior to the expiration of the temporary order.

(3) The court may receive and consider, at a hearing held pursuant to this subsection, evidence and information that would be inadmissible under the Federal Rules of Evidence.

(e) Upon conviction of a person under this section, the court shall enter a judgment of forfeiture of the property to the United States and shall also authorize the Attorney General to seize all property ordered forfeited upon such terms and conditions as the court shall deem proper. Following the entry of an order declaring the property forfeited, the court may, upon application of the United States, enter such appropriate restraining orders or injunctions, require the execution of satisfactory performance bonds, appoint receivers, conservators, appraisers, accountants, or trustees, or take any other action to protect the interest of the United States in the property ordered forfeited. Any income accruing to, or derived from, an enterprise or an interest in an enterprise which has been ordered forfeited under this section may be used to offset ordinary and necessary expenses to the enterprise which are required by law, or which are necessary to protect the interests of the United States or third parties.

(f) Following the seizure of property ordered forfeited under this section, the Attorney General shall di-

rect the disposition of the property by sale or any other commercially feasible means, making due provision for the rights of any innocent persons. Any property right or interest not exercisable by, or transferable for value to, the United States shall expire and shall not revert to the defendant, nor shall the defendant or any person acting in concert with or on behalf of the defendant be eligible to purchase forfeited property at any sale held by the United States. Upon application of a person, other than the defendant or a person acting in concert with or on behalf of the defendant, the court may restrain or stay the sale or disposition of the property pending the conclusion of any appeal of the criminal case giving rise to the forfeiture, if the applicant demonstrates that proceeding with the sale or disposition of the property will result in irreparable injury, harm or loss to him. Notwithstanding 31 U.S.C. 3302(b), the proceeds of any sale or other disposition of property forfeited under this section and any moneys forfeited shall be used to pay all proper expenses for the forfeiture and the sale, including expenses of seizure, maintenance and custody of the property pending its disposition, advertising and court costs. The Attorney General shall deposit in the Treasury any amounts of such proceeds or moneys remaining after the payment of such expenses.

(g) With respect to property ordered forfeited under this section, the Attorney General is authorized to—

(1) grant petitions for mitigation or remission of forfeiture, restore forfeited property to victims of a violation of this chapter, or take any other action to protect the rights of innocent persons which is in

the interest of justice and which is not inconsistent with the provisions of this chapter;

(2) compromise claims arising under this section;

(3) award compensation to persons providing information resulting in a forfeiture under this section;

(4) direct the disposition by the United States of all property ordered forfeited under this section by public sale or any other commercially feasible means, making due provision for the rights of innocent persons; and

(5) take appropriate measures necessary to safeguard and maintain property ordered forfeited under this section pending its disposition.

(h) The Attorney General may promulgate regulations with respect to—

(1) making reasonable efforts to provide notice to persons who may have an interest in property ordered forfeited under this section;

(2) granting petitions for remission or mitigation of forfeiture;

(3) the restitution of property to victims of an offense petitioning for remission or mitigation of forfeiture under this chapter;

(4) the disposition by the United States of forfeited property by public sale or other commercially feasible means;

(5) the maintenance and safekeeping of any property forfeited under this section pending its disposition; and

(6) the compromise of claims arising under this chapter.

Pending the promulgation of such regulations, all provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are imposed upon the Customs Service or any person with respect to the disposition of property under the customs law shall be performed under this chapter by the Attorney General.

(i) Except as provided in subsection (*l*), no party claiming an interest in property subject to forfeiture under this section may—

(1) intervene in a trial or appeal of a criminal case involving the forfeiture of such property under this section; or

(2) commence an action at law or equity against the United States concerning the validity of his alleged interest in the property subsequent to the filing of an indictment or information alleging that the property is subject to forfeiture under this section.

(j) The district courts of the United States shall have jurisdiction to enter orders as provided in this section without regard to the location of any property which may be subject to forfeiture under this section or which has been ordered forfeited under this section.

(k) In order to facilitate the identification or location of property declared forfeited and to facilitate the disposition of petitions for remission or mitigation of forfeiture, after the entry of an order declaring property forfeited to the United States the court may, upon application of the United States, order that the testimony of any witness relating to the property forfeited be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged be produced at the same time and place, in the same manner as provided for the taking of depositions under Rule 15 of the Federal Rules of Criminal Procedure.

(*l*)(1) Following the entry of an order of forfeiture under this section, the United States shall publish notice of the order and of its intent to dispose of the property in such manner as the Attorney General may direct. The Government may also, to the extent practicable, provide direct written notice to any person known to have alleged an interest in the property that is the subject of the order of forfeiture as a substitute for published notice as to those persons so notified.

(2) Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may, within thirty days of the final publication of notice or his receipt of notice under paragraph (1), whichever is

earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury.

(3) The petition shall be signed by the petitioner under penalty of perjury and shall set forth the nature and extent of the petitioner's right, title, or interest in the property, the time and circumstances of the petitioner's acquisition of the right, title, or interest in the property, any additional facts supporting the petitioner's claim, and the relief sought.

(4) The hearing on the petition shall, to the extent practicable and consistent with the interests of justice, be held within thirty days of the filing of the petition. The court may consolidate the hearing on the petition with a hearing on any other petition filed by a person other than the defendant under this subsection.

(5) At the hearing, the petitioner may testify and present evidence and witnesses on his own behalf, and cross-examine witnesses who appear at the hearing. The United States may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses who appear at the hearing. In addition to testimony and evidence presented at the hearing, the court shall consider the relevant portions of the record of the criminal case which resulted in the order of forfeiture.

(6) If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that—

(A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which give rise to the forfeiture of the property under this section; or

(B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section;

the court shall amend the order of forfeiture in accordance with its determination.

(7) Following the court's disposition of all petitions filed under this subsection, or if no such petitions are filed following the expiration of the period provided in paragraph (2) for the filing of such petitions, the United States shall have clear title to property that is the subject of the order of forfeiture and may warrant good title to any subsequent purchaser or transferee.

(n) If any of the property described in subsection (a), as a result of any act or omission of the defendant—

(1) cannot be located upon the exercise of due diligence;

(2) has been transferred or sold to, or deposited with, a third party;

(3) has been placed beyond the jurisdiction of the court;

(4) has been substantially diminished in value; or

(5) has been commingled with other property which cannot be divided without difficulty;

the court shall order the forfeiture of any other property of the defendant up to the value of any property described in paragraphs (1) through (5).

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter

may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

Venue and process

(a) Any civil action or proceeding under this chapter against any person may be instituted in the district court of the United States for any district in which such person resides, is found, has an agent, or transacts his affairs.

(b) In any action under section 1964 of this chapter in any district court of the United States in which it is shown that the ends of justice require that other parties residing in any other district be brought before the court, the court may cause such parties to be summoned, and process for that purpose may be served in any judicial district of the United States by the marshal thereof.

(c) In any civil or criminal action or proceeding instituted by the United States under this chapter in the district court of the United States for any judicial district, subpoenas issued by such court to compel the attendance of witnesses may be served in any other judicial district, except that in any civil action or proceeding no such subpena shall be issued for service upon any individual who resides in another district at a place more than one

hundred miles from the place at which such court is held without approval given by a judge of such court upon a showing of good cause.

(d) All other process in any action or proceeding under this chapter may be served on any person in any judicial district in which such person resides, is found, has an agent, or transacts his affairs.

In any civil action instituted under this chapter by the United States in any district court of the United States, the Attorney General may file with the clerk of such court a certificate stating that in his opinion the case is of general public importance. A copy of that certificate shall be furnished immediately by such clerk to the chief judge or in his absence to the presiding district judge of the district in which such action is pending. Upon receipt of such copy, such judge shall designate immediately a judge of that district to hear and determine action.

§ 1967. Evidence

In any proceeding ancillary to or in any civil action instituted by the United States under this chapter the proceedings may be open or closed to the public at the discretion of the court after consideration of the rights of affected persons.

§ 1968. Civil investigative demand

(a) Whenever the Attorney General has reason to believe that any person or enterprise may be in possession, custody, or control of any documentary materials relevant to a racketeering investigation, he may, prior to the institution of a civil or criminal proceeding thereon, issue in writing, and cause to be served upon such person, a

civil investigative demand requiring such person to produce such material for examination.

(b) Each such demand shall—

(1) state the nature of the conduct constituting the alleged racketeering violation which is under investigation and the provision of law applicable thereto;

(2) describe the class or classes of documentary material produced thereunder with such definiteness and certainty as to permit such material to be fairly identified.

(3) state that the demand is returnable forthwith or prescribe a return date which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying or reproduction; and

(4) identify the custodian to whom such material shall be made available.

(c) No such demand shall—

(1) contain any requirement which would be held to be unreasonable if contained in a subpoena duces tecum issued by a court of the United States in aid of a grand jury investigation of such alleged racketeering violation; or

(2) require the production of any documentary evidence which would be privileged from disclosure if demanded by a subpena duces tecum issued by a court of the United States in aid of a grand jury investigation of such alleged racketeering violation.

(d) Service of any such demand or any petition filed under this section may be made upon a person by—

(1) delivering a duly executed copy thereof to any partner, executive officer, managing agent, or general agent thereof, or to any agent thereof authorized by appointment or by law to receive service of process on behalf of such person, or upon any individual person;

(2) delivering a duly executed copy thereof to the principal office or place of business of the person to be served; or

(3) depositing such copy in the United States mail, by registered or certified mail duly addressed to such person at its principal office or place of business.

(e) A verified return by the individual serving any such demand or petition setting forth the manner of such service shall be prima facie proof of such service. In the case of service by registered or certified mail, such return shall be accompanied by the return post office receipt of delivery of such demand.

(f) (1) The Attorney General shall designate a racketeering investigator to serve as racketeer document custodian, and such additional racketeering investigators as he shall determine from time to time to be necessary to serve as deputies to such officer.

(2) Any person upon whom any demand issued this section has been duly served shall make such material available for inspection and copying or reproduction to the custodian designated therein at the principle place

of business of such person, or at such other place as such custodian and such person thereafter may agree and prescribe in writing or as the court may direct, pursuant to this section on the return date specified in such demand, or on such later date as such custodian may prescribe in writing. Such person may upon written agreement between such person and the custodian substitute for copies of all or any part of such material originals thereof.

(3) The custodan to whom any documentary material is so delivered shall take physical possession thereof, and shall be responsible for the use made thereof and for the return thereof pursuant to this chapter. The custodian may cause the preparation of such copies of such documentary material as may be required for offical use under regulations which shall be promulgated by the Attorney General. While in the possession of the custodian, no material so produced shall be available for examination, without the consent of the person who produced such material, by any individual other than the Attorney General. Under such reasonable terms and conditions as the Attorney General shall prescribe, documentary material while in the possession of the custodian shall be available for examination by the person who produced such material or any duly authorized representatives of such person.

(4) Whenever any attorney has been designated to appear on behalf of the United States before any court or grand jury in any case or proceeding involving any alleged violation of this chapter, the custodian may deliver to such attorney such documentary material in the possession of the custodian as such attorney determines to be required for use in the presentation of such case

or proceeding on behalf of the United States. Upon the conclusion of any such case or proceeding, such attorney shall return to the custodian any documentary material so withdrawn which has not passed into the control of such court or grand jury through the introduction thereof into the record of such case or proceeding.

(5) Upon the completion of—

(i) the racketeering investigation for which any documentary material was produced under this chapter, and

(ii) any case proceeding arising from such investigation,

the custodian shall return to the person who produced such material all such material other than copies thereof made by the Attorney General pursuant to this subsection which has not passed into the control of any court or grand jury through the introduction thereof into the record of such case or proceeding.

(6) When any documentary material has been produced by any person under this section for use in any racketeering investigation, and no such case or proceeding arising therefrom has been instituted within a reasonable time after completion of the examination and analysis of all evidence assembled in the course of such investigation, such person shall be entitled, upon written demand made upon the Attorney General, to the return of all documentary material other than copies thereof made pursuant to this subsection so produced by such person.

(7) In the event of the death, disability, or separation from service of the custodian of any documentary

material produced under any demand issued under this section or the official relief of such custodian from responsibility for the custody and control of such material, the Attorney General shall promptly—

(i) designate another racketeering investigator to serve as custodian thereof, and

(ii) transmit notice in writing to the person who produced such material as to the identity and address of the successor so designated.

Any successor so designated shall have with regard to such materials all duties and responsibilities imposed by this section upon his predecessor in office with regard thereto, except that he shall not be held responsible for any default or dereliction which occurred before his designation as custodian.

(g) Whenever any person fails to comply with any civil investigative demand duly served upon him under this section or whenever satisfactory copying or reproduction of any such material cannot be done and such person refuses to surrender such material, the Attorney General may file, in the district court of the United States for any judicial district in which such person resides, is found, or transacts business, and serve upon such person a petition for an order of such court for the enforcement of this section, except that if such person transacts business in more than one such district such petition shall be filed in which such person maintains his principal place of business, or in such other district in which such person transacts business as may be agreed upon by the parties to such petition.

(h) Within twenty days after the service of any such demand upon any person, or at any time before the return date specified in the demand, whichever period is shorter, such person may file, in the district court of the United States for the judicial district within which such person resides, is found, or transacts business, and serve upon such custodian a petition for an order of such court modifying or setting aside such demand. The time allowed for compliance with the demand in whole or in part as deemed proper and ordered by the court shall not run during the pendency of such petition in the court. Such petition shall specify each ground upon which the petitioner relies in seeking such relief, and may be based upon any failure of such demand to comply with the provisions of this section or upon any constitutional or other legal right or privilege of such person.

(i) At any time during which any custodian is in custody or control of any documentary material delivered by any person in compliance with any such demand, such person may file, in the district court of the United States for the judicial district within which the office of such custodian is situated, and serve upon such custodian a petition for an order of such court requiring the performance by such custodian of any duty imposed upon him by this section.

(j) Whenever any petition is filed in any district court of the United States under this section, such court shall have jurisdiction to hear and determine the matter so presented, and to enter such order or orders as may be required to carry into effect the provisions of this section.

No. 87-1252

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1987

H.J., INC., a Minnesota corporation,
KIRK DAHL, LARRY KRUGEN and MARY KRUGEN,
individually and d/b/a PHOTO IMAGES, SUSAN DAVIS,
ROBERT NEAL, ISAAC F. WARD,
RICHARD L. ANDERSON, THOMAS J. MOTT,
and all others similarly situated,

Petitioners,

v.

NORTHWESTERN BELL TELEPHONE COMPANY,
a subsidiary of U.S. WEST, A. B. C.
individually and D. E. F. as corporations,
and other unnamed Co-conspirators,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

BRIEF OF AMICUS CURIAE TRIAL LAWYERS FOR PUBLIC JUSTICE IN SUPPORT OF PETITIONERS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1252

H.J., INC., a Minnesota corporation,
KIRK DAHL, LARRY KRUGEN and MARY KRUGEN,
individually and d/b/a PHOTO IMAGES,
SUSAN DAVIS, ROBERT NEAL, ISAAC F. WARD,
RICHARD L. ANDERSON, THOMAS J. MOTT,
and all others similarly situated,

Petitioners,

v.

NORTHWESTERN BELL TELEPHONE COMPANY,
a subsidiary of U.S. WEST, A. B. C.
individually, and D. E. F. as corporations,
and other unnamed Co-conspirators,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

BRIEF OF AMICUS CURIAE TRIAL LAWYERS FOR PUBLIC JUSTICE IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE

This brief is submitted on behalf of Trial Lawyers for Public Justice, P.C. (TLPJ).* TLPJ is a public interest law firm

*The assistance in the preparation of this brief of law students Joseph J. Karaszewski (Notre Dame '88) and Thomas J. Antonini (Notre Dame '88) is hereby acknowledged.

devoted to representing victims of corporate or government abuse in cases that have the potential for advancing the state of the law, for educating the public, for modifying corporate or government behavior, or for improving the access of victims to justice and compensation for the wrongs that have been done them. Supported by over 550 trial lawyers in 44 states and the District of Columbia, it is the only public interest law firm in the country dedicated to using plaintiffs' tort and trial law for the public good. TLPJ has pioneered in cases involving toxic dumping, water pollution, sex discrimination, experimentation using unwitting human guinea pigs, the protection and compensation of whistleblowers, lead paint poisoning of inner-city children, and unsafe automobiles and all-terrain vehicles.

TLPJ has found the Racketeer Influenced and Corrupt Organizations Act (RICO) to be the only remedy that a wide range of the American people, from small business through the elderly, have to obtain adequate redress for being cheated in the many criminal ways that the unscrupulous use. TLPJ wants to be sure that the access to justice and to compensation that Congress provided in the civil remedy provision of RICO, 18 U.S.C. § 1964, is neither narrowed nor foreclosed, but rather is nurtured and interpreted in keeping with its remedial purpose.

SUMMARY OF ARGUMENT

In 1970, Congress enacted the Organized Crime Control Act, Title IX of which is known as "RICO." Congress deliberately crafted a broad statute in an attempt to deal with the pervasive problem of organized crime. Congress, however, consciously did not limit RICO to organized crime figures; it made it applicable to all who violate its provisions. In enacting RICO, Congress was concerned with a variety of forms of

criminal conduct, including fraud. Nothing that has happened since undermines Congress' 1970 judgment. Fraud costs the nation billions of dollars annually. It victimizes small businesses, savers, investors, homeowners, the elderly, consumers, and federal, state, and local governments. Attempts to narrow RICO because of a fear of a litigation explosion are misplaced factually and are constitutionally inappropriate. This Court ought to adopt a straightforward definition of "pattern" that reflects RICO's text, legislative history and policy. It should be at least as broad as the definition in 18 U.S.C. § 3575(e), which this Court noted favorably in *Sedima's* footnote 14.

ARGUMENT

I. CONGRESS DELIBERATELY CRAFTED RICO AS A BROAD REMEDY FOR VICTIMS OF CRIME

A. RICO Was Intended to Apply to Both Legitimate and Illegitimate Enterprises.

In 1970, Congress enacted the Organized Crime Control Act, Title IX of which is known as RICO.[1] The "legislative history [of RICO] clearly demonstrates that . . . [it] was intended to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots." *Russello v. United States*, 464 U.S. 16, 26 (1983). "[T]he major purpose of Title IX . . . [was] to address the infiltration of legitimate business by organized crime." *United States v.*

[1] 18 U.S.C. §§ 1961-1968 (1982). *See generally*, Blakey & Cessar, *Equitable Relief Under Civil RICO*, 62 Notre Dame L. Rev. 526 (1987) (cited as *Equitable Relief*); Blakey & Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts - Criminal and Civil Remedies*, 53 Temple L.Q. 1009 (1980) (cited as *Basic Concepts*); Blakey, *The RICO Civil Fraud Action in Context*, 58 Notre Dame L. Rev. 237 (1982) (cited as *Civil Action*).

Turkette, 452 U.S. 576, 591 (1981). But "Congress wanted to reach both 'legitimate' and 'illegitimate' enterprises." 452 U.S. at 590. "[R]ejected [also has been the] notion [that RICO] applies only to organized crime in the 'classic mobster' sense." *United States v. Grande*, 620 F.2d 1026, 1030 (4th Cir.), *cert. denied*, 449 U.S. 919 (1980). As this Court recognized in *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 497 (1985): legitimate businesses "enjoy neither an inherent incapacity for criminal activity nor immunity from its consequences." *Id.* In addition, "the courts [have been] all but unanimous in their refusal to read RICO as prohibiting only the infiltration of legitimate organizations . . ." *United States v. Altomare*, 625 F.2d 5, 7 n. 7 (4th Cir. 1980) (emphasis added). *See Sedima*, 473 U.S. at 495: RICO "makes it unlawful for any person — not just mobsters — to [violate its substantive provisions] through a pattern of racketeering activity."[2] "Pattern of racketeering activity" includes (1) violence, (2) provision of illegal goods and services, (3) corruption in the labor movement or among public officials, and (4) commercial and other forms of fraud. *Civil Action* at 300-06.

B. RICO Was Intended to Be Broadly Construed to Effectuate Its Remedial Purposes.

18 U.S.C. § 1962(a)-(d) sets forth "standards" of "unlawful" conduct, which are enforced through "criminal" and "civil" sanctions. Section 1963 sets out the criminal remedies. Section 1964 sets out the civil remedies.[3] Section 1962 states what is "unlawful," not "criminal." Because the

[2] *See also Oul Construction Co. v. Ronald Adams Contractor, Inc.*, 727 F.2d 540, 542 (5th Cir. 1984), *cert. denied*, 469 U.S. 831 (1984).

[3] *See Sedima*, 473 U.S. at 491; *Basic Concepts* at 1027 n.71; *Civil Action* at 343 n.20.

scope of civil RICO is *broader* than the scope of criminal RICO, the statute is *not* primarily criminal and punitive, but primarily civil and remedial. *Sedima*, 473 U.S. at 496; *Turkette*, 452 U.S. at 593 (RICO is "both preventive and remedial"); *see generally Civil Action* at 243 n.20.[4] RICO's civil remedies, based on a showing of the preponderance of the evidence, are available to the government or to the victims of racketeering activity themselves.[5]

Congress, moreover, directed that RICO "be liberally construed to effectuate its remedial purposes." 84 Stat. 947 (1970). *See Sedima*, 473 U.S. at 491 n.10, 497-98; *Russello*, 464 U.S. at 2.[6] The directive is a "mandate." *United States v. Long*, 651 F.2d 239, 241 (4th Cir.), *cert. denied*, 454 U.S. 896 (1981). This Court, too, has recognized Congress' plain

[4] *See also* 115 Cong. Rec. 6993 (1969) (statement of Sen. Hruska regarding S. 1623, the immediate predecessor to S. 1861, from which Title IX was drawn, "The criminal provisions are intended primarily as an adjunct to the civil provisions, which I consider as the more important feature of the bill."); 116 Cong. Rec. 602 (1970) (statement of Sen. Hruska) ("principal value of . . . legislation is in its civil provisions"). Nevertheless, good faith commercial disputes do not implicate RICO, since they do not equate to *criminal* fraud. RICO does not involve strict liability, negligence, or constructive fraud. *Civil Action* at 244 n.23, 306 n.172, 334 n.216. RICO, through its predicate offenses, requires a *criminal* state of mind. *See, e.g., Durland v. United States*, 161 U.S. 306, 314 (1896) (good faith defense to mail fraud); *Haroco, Inc. v. American Nat'l Bank & Trust Co.*, 747 F.2d 384, 399 n.16 (7th Cir. 1984) (criminal fraud under RICO must be distinguished from civil fraud), *aff'd on other grounds*, 473 U.S. 606 (1985).

[5] *United States v. Cappetto*, 502 F.2d 1351, 1357 (7th Cir. 1974) (government suit), *cert. denied*, 420 U.S. 925 (1975); *Alcorn County, Miss. v. U.S. Interstate Supplies*, 731 F.2d 1160, 1169 (5th Cir. 1984) (victim suit). Note, *Civil RICO: Prior Criminal Conviction and Burden of Proof*, 60 Notre Dame L. Rev. 560 (1985).

[6] *See generally Equitable Relief* at 21; *Civil Action* at 245 n.25, 288 n.150.

intent. "RICO is to be read broadly," and it "is to 'be construed to effectuate its remedial purposes . . .' " *Sedima*, 473 U.S. at 497. "[RICO's] 'remedial purposes' are nowhere more evident than in the provision of a private action for those injured by racketeering activity." *Id.* In short, "RICO was an aggressive initiative to supplement old remedies and develop new methods for fighting crime . . . [and] it is in this spirit that all of the Act's provisions should be read." *id.*

C. RICO Was Intended to Encourage Civil Litigants to Enforce the Laws on Which RICO Is Predicated.

The private enforcement provisions of RICO were modeled on, but are not identical to, the antitrust laws. S. Rep. No. 617, 91st Cong., 1st Sess. 81 (1969); H.R. Rep. No. 1549, 91st Cong., 1st Sess. 81 (1970).[7] Appropriately, the antitrust statutes have been termed the "Magna Charta of free enterprise." *United States v. Topco Associates, Inc.*, 405 U.S. 596, 610 (1972). The antitrust laws "are as important to the preservation of economic freedom and our free enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." *Id.* A private "treble-damages remedy [is needed] . . . precisely for the purpose of encouraging *private*

[7] Congress passed the Sherman Act in 1890, yet it was not until recent times that the private enforcement mechanism of the antitrust statutes came into their own. The thrust of scholarly analysis of the Act's history placed that disuse at the door of "judicial hostility." Sullivan, *Breaking up the Treble Play: Attacks on the Private Treble Damage Antitrust Action*, 14 SETON HALL L. REV., 17, 19 (1983). Advances occurred after the New Deal, but the private enforcement mechanism did not become an effective legal tool until key decisons of this Court in the 1950s. *See, e.g., Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 211 (1959). The historical parallels between the enforcement of the antitrust laws and RICO are haunting.

challenges to antitrust violations." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979) (emphasis in original). Such "private antitrust litigation is one of the surest weapons for effective enforcements of the antitrust laws." *Leh v. General Petroleum Corp.*, 382 U.S. 54, 59 (1965) (quoting *Minnesota Mining & Manufacturing Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311, 318 (1965)). Private suits "provide a significant supplement to the limited resources available to the Department of Justice" to enforce the antitrust statutes. *Reiter*, 442 U.S. at 344. *See Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 107 S. Ct. 2759, 2764 (1987) ("bring to bear the pressure of private attorneys general"); *Sedima*, 473 U.S. at 493 ("to fill prosecutorial gaps").[8]

Like the antitrust laws, RICO creates "a private enforcement mechanism that . . . deter[s] violators and provide[s] ample compensation to the victims . . ." *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 472 (1982). *See Sedima*, 473 U.S. at 495; *Alcorn County, Miss. v. U.S. Interstate Supplies, Inc.*,

[8] In fact, between 1960 and 1980, of the 22,585 civil and criminal cases brought under the antitrust provisions by the government or private parties, 85% were instituted by *private* plaintiffs. U.S. Department of Justice, *Source Book on Criminal Justice Statistics* 431 (1981). Professor (now Judge) Posner also argues forcefully on economic grounds for *private* enforcement of more than actual damages awards against all forms of deliberate antisocial conduct, particularly where the factor of concealment is present. Posner, *Economic Analysis of Law* 462 (private enforcement), 143, 272 (more than actual damage awards, for deliberate conduct), 235 (concealment) (2d ed. 1977). On the history and economic rationale of treble damages, *see Equitable Relief* at 530 n.17; Blakey, Editorial, RICO LAW REPTR. No. 11 (Jan. 1988). Beside Posner's analysis, the framing of this sort of equation has been entrusted by the constitution to the Legislative Branch. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 748 (1975) (Rehnquist, J.) ("duty of the Judicial Branch . . . [is] to administer the law which Congress enact[s]").

731 F.2d 1160, 1165 (5th Cir. 1984) (Congress intended RICO's treble damage action to "provide strong incentives to civil litigants . . . in deterring racketeering . . ."). RICO's treble damage provisions were "intended by Congress . . . to encourage private enforcement of laws on which RICO is predicated." *Id.*[9]

The Organized Crime Control Act — including RICO — fits easily into a consistent pattern of Federal legislation enacted as general reform over the past half century or more aimed at a specific target, but drafted without limiting it to a specific target.[10]

[9]RICO and the antitrust statutes, moreover, are well integrated. "There are three possible kinds of force which a firm can resort to: violence (or threat of it), deception, or market power." Kaysen & Turner, *Antitrust Policy* 17 (1959). RICO focuses on the first two; antitrust laws focus on the third. *See also American C. & L. Co. v. United States*, 257 U.S. 377, 414 (1921) (Brandeis, J., dissenting) ("Restraint may be exercised through force or fraud or agreement."). *See generally*, Note, *Treble Damages Under RICO: Characterization and Computation*, 61 NOTRE DAME L. REV. 526, 533-43 (1986) ("(1) encourage private citizens to bring RICO actions, (2) deter future violators, and (3) compensate victims for all accumulative harm. These multiple and convergent purposes make the treble damage provision a powerful mechanism in the effort to vindicate the interests of those victimized by crime.").

[10]*See, e.g.*, 18 U.S.C. § 224 (sports bribery) held not limited to organized crime in *United States v. Walsh*, 544 F.2d 156, 159 (4th Cir. 1976), *cert. denied*, 429 U.S. 1093 (1977); 18 U.S.C. §§ 841-48 (explosives) held not limited to organized crime in *United States v. Schwanke*, 598 F.2d 575, 578 (10th Cir. 1979); 18 U.S.C. § 891 (loan sharking) held not limited to organized crime in *United States v. Keresty*, 465 F.2d 36, 43(3d Cir.), *cert. denied*, 409 U.S. 991 (1972); 18 U.S.C. § 1510 (obstruction of criminal investigation) held not limited to organized crime in *United States v. Koehler*, 544 F.2d 1326, 1330 n.6 (5th Cir. 1977); 18 U.S.C. § 1951 (extortion) held not limited to racketeering in *United States v. Culbert*, 435 U.S. 371, 373-74 (1978); 18 U.S.C. § 1952 (Travel Act) held not limited to organized crime bribery in *Perrin v. United States*, 444 U.S. 37, 46 (1979); 18 U.S.C. § 1953 (lottery tickets) held not limited to organized crime in *United States v. Fabrizio*, 385 U.S. 263, 265-67 (1966); 18 U.S.C. § 21134(b) (bank robbery) held not limited to gangsters in *Bell v. United States*, 462 U.S. 356, 358-62 (1983); 18 U.S.C. § 2421 (white slave traffic) held not limited to commercial prostitution in *Caminetti v. United States*, 242 U.S. 470, 485-90 (1917); 18 U.S.C. § 3575 (sentencing) held not limited to organized crime in *United States v. Schell*, 692 F.2d 672, 674 (10th Cir. 1982).

D. Narrow Interpretations of RICO Have Repeatedly Been Adopted by Lower Courts and Rejected on Appeal.

At first, the Department of Justice moved slowly to use RICO criminally. Today, it is the prosecutor's tool of choice in organized crime, political corruption, white-collar crime, terrorism, and hate-group prosecutions. *See Oversight on Civil RICO Suits, Hearings Before the Senate Committee on the Judiciary*, 99th Cong., 1st Sess. 109-11 (1985) (testimony of Assistant Attorney General Stephen S. Trott) (cited as "Trott"). The Department of Justice has also begun to implement the civil provisions. *See, e.g., United States v. Local 560, International Brotherhood of Teamsters*, 581 F. Supp. 279 (D.N.J. 1984), *aff'd*, 780 F.2d 267 (3d Cir. 1985) (civil suit against organized crime controlled union), *cert. denied*, 106 S. Ct. 2247 (1986); Trott at 116-17.

The private bar did not begin to bring civil RICO suits until about 1975. When it did, the district courts reacted with extreme hostility and undertook judicially to redraft the statute in an effort to dismiss civil suits in all possible ways. The first effort to redraft civil RICO involved reading into it an "organized crime" limitation. *See, e.g., Barr v. WUI/TAS, Inc.*, 66 F.R.D. 109, 113 (S.D.N.Y. 1975). Because that limitation had no support in the text of the statute — it was also specifically voted down in the legislative debates — the 2nd, 5th, 7th and 8th Circuits quickly rejected it. *Alcorn County*, 731 F.2d at 1167 (cases cited).

The next effort involved reading a "competitive injury" limitation into the statute. *See, e.g., North Barrington Development, Inc. v. Fanslow*, 547 F. Supp. 207, 211 (N.D. Ill. 1980). The 7th and 8th Circuits quickly turned this effort aside. *Schacht v. Brown*, 711 F.2d 1343, 1356-58 (7th Cir.), *cert. denied* 464 U.S. 1002 (1983) (the organized crime limitation "revived under . . . [a new] guise"); *Bennett v. Berg*, 685 F.2d 1053, 1058-59 (8th Cir. 1982), *aff'd on rehearing en banc*, 710 F.2d 1361, *cert. denied*, 464 U.S. 1008 (1983).

Then the district courts developed the "racketeering injury" limitation. *See, e.g., Landmark Savings and Loan v. Rhoades*, 527 F. Supp. 206, 208-09 (E.D. Mich. 1981). It was, together with the criminal conviction limitation, a companion effort to circumscribe the plain text and the clear legislative history of RICO. Both limitations, adopted by a sharply divided 2nd Circuit, were repudiated by this Court in *Sedima*.

Ignoring the general teaching of this Court in *Sedima*, including that of footnote 14, lower federal courts have continued to dismiss most civil RICO cases. They have not sought, as this Court suggested, to develop a "meaningful" definition of the concept of "pattern," but to find an easy device to clear their dockets. *Equitable Relief* at 620 (complaint dismissed in 51% of post-*Sedima* reported decisions). Substitute "pattern" for "organized crime" or "racketeering injury" and the decisions continue in their pre-*Sedima* direction. The course threatens to frustrate Congress' 1970 promise of "enhanced sanctions and new remedies" for old wrongs. 84 Stat. 923. This appeal, therefore, focuses on developing a meaningful definition of "pattern" in the light of RICO's legislative history, text and purpose.

E. The Legislative History of RICO Does Not Support a Narrow Interpretation of Any of Its Provisions.

While the language of a statute must "ordinarily be regarded as conclusive," it can give way to a "clearly expressed legislative intention" to the contrary found in the statute's legislative history. *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). When RICO's legislative history is carefully and fully reviewed, however, it confirms that "Congress meant what it said." *INS v. Phinpathya*, 464 U.S. 183, 193 (1984). *See Civil Action* at 280.

Congress acted deliberately in its enactment of the Organized Crime Control Act — including civil RICO — and it had impressive advice during the process. The process originated in the hearings and reports of the Kefauver Committee, whose focus included infiltration by organized criminal elements into legitimate businesses.[11] The American Bar Association ("ABA") formed its Organized Crime Commission and participated actively, recommending model legislation, which included immunity, perjury, and syndicated gambling provisions.[12] In 1967, the President's Commission on Law Enforcement and Administration of Justice made the key recommendation that led to RICO, when it urged that Congress adopt antitrust-type remedies to control underworld activities, par-

[11] *See generally Basic Concepts* at 1014; *Civil Action* at 249.

[12] *See, e.g.*, 2 Organized Crime and Law Enforcement: Final Report by and Model Acts Prepared For the ABA Commission on Organized Crime 57-91 (syndicated gambling) and 157-86 (immunity) (1953); *Organized Crime Control: Hearings Before Subcomm. No. 5, House Comm. on Judiciary, 91st Cong., 2d Sess.* 579-85 (1970) (perjury) (hereinafter *House Hearings*).

ticularly in legitimate businesses.[13] In response, Senator Hruska and Congressman (now Judge) Poff introduced companion legislation that included criminal and civil sanctions and

[13] President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society: Final Report* 208 (1967) ("techniques . . . especially valuable because they require a less rigid standard of proof").

The Commission also observed:

> [W]hite-collar crime [is] – [a term] now commonly used to designate those occupational crimes committed in the course of their work by persons of high status and social repute [that] . . . are only rarely dealt with through the full force of criminal sanctions. . . .
>
> Serious erosion of morals accompanies [the white collar offender's] violation. [Those who so] flout the law set an example for other business and influence individuals, particularly young people, to commit other kinds of crime on the ground that everybody is taking what he can get. *Id.* at 47-48.

It commented on fraud:

> Fraud is especially vicious when it attacks, as it so often does, the poor or those who live on the margin of poverty. Expensive nostrums for incurable diseases, home improvement frauds, frauds involving the sale or repair of cars and other criminal schemes create losses which are not only sizable in gross but are also significant and possibly devastating for individual victims. *Id.* at 33-34.

In addition, it noted the changes in social and economic conditions within which the administration of justice had to be viewed:

> During the last few centuries economic life has become vastly more complex. Individual families or groups of families are not self-sufficient; they rely for the basic necessities of life on thousands or even millions of different people, each with a specialized function, many of whom live hundreds or thousands of miles away. *Id.* at 47-48.

See also Basic v. Levinson, 108 S. Ct. 978, 989-90 (1988) ("The modern securities market . . . differs from the face to face transactions contemplated by early fraud cases . . . .").

public and private enforcement mechanisms in both Houses of Congress. *See, e.g.*, S. 2048, 90th Cong., 1st Sess. (1967); 113 Cong. Rec. 17,999 (1967). The ABA carefully studied the bills and endorsed their concepts, including the private enforcement mechanism, but recommended that Congress draft them outside the antitrust statutes to give them a broader impact.

The ABA presented these recommendations to the House and the Senate in 1969.[14] Additionally, the National Commission on Reform of the Federal Criminal Law undertook similar studies.[15] The Commission included Congressman Poff, its vice-chairman, and Senators McClellan and Hruska, as well as Congressman (now Judge) Mikva. Subsequently, Senator Hruska and Congressman Poff drafted new legislation that took the ABA at its word. They introduced the new legislation in both Houses.[16] The Senate held hearings at which the ABA orally presented its favorable views.[17] The President also endorsed the legislation while it was being processed in the Senate and specifically called for antitrust-type remedies in his "Message on Organized Crime." *Senate Hearings* at 449 ("The injunction with its power of contempt and seizure, monetary fines and treble damages actions . . . suggest a new panoply of weapons. . . ."). As a result of these hearings, Senators McClellan and Hruska, after consultation with Congressman Poff, introduced S. 1861, which in its Statement of Findings and Policy was termed "remedial," and its "liberal

[14] *Measures Relating to Organized Crime:* Hearings Before the Subcomm. on the Judiciary, 91st Cong., 1st Sess. 259 (statement), 556 (report) (1969) (hereinafter *Senate Hearings*); *House Hearings* at 537 (statement), 147 (report). *See generally, Basic Concepts* at 1015; *Civil Action* at 254-56.

[15] *Civil Action* at 253 n.47 and accompanying text.

[16] *See, e.g.*, S. 1623, 91st Cong., 1st Sess. (1969); 115 Cong. Rec. 6,995-96 (1969).

[17] *Senate Hearings* at 259 (testimony of Rufus King for the ABA).

ly reported the RICO bill in its enacted language, which applied to "fraud" and included the treble damage enforcement mechanism. H.R. Rep. No. 1549, 91st Cong., 2d Sess. 56-58 (1970). Dissenting Committee members, including Congressman Mikva, specifically objected to the private civil provisions' breadth. The dissenting members noted that the provisions were "a tool to be employed for all." *Id.* at 187. They also stressed the burden that their breadth might place on the courts, federalism, and legitimate businesses. *Id.* (courts); 116 Cong. Rec. 35,205 (1970) (statement of Cong. Mikva) (federalism); *id.* at 35,332 (statement of Cong. Mikva) (legitimate businesses). Despite these objections, the legislation passed the House by a vote of 341 to 26. 116 Cong. Rec. 35,363 (1970). After the Senate reconsidered it,[20] the

that might exist). So, too, does RICO. 84 Stat. 942 (1970) (not supersede Federal or State criminal or civil sanctions). Accordingly, there should be no concern about overlap with other remedies (as there was in *FLIP Mortgage Co. v. McElhane*, 841 F.2d 531, 538 (4th Cir. 1988) (narrow construction of "pattern" to avoid impact on state remedies).

[20] Significantly, when the Senate reconsidered the House-passed bill, Senator Dole illustrated the importance of civil RICO by describing a pattern of arson-murder visited on the A & P Tea Co. in an unsuccessful effort to sell it detergent. Senator Dole stated that the statute would impose "heavy" economic sanctions on such conduct, and it would serve as an "effective" deterrent. 116 Cong. Rec. 36,296 (1970). Obviously, RICO would do neither to this classic effort to infiltrate legitimate businesses by organized crime if the 8th Circuit's "single scheme" limitation were read into "pattern," since the effort to sell the detergent was, in fact, a "single scheme." It is doubtful, too, that this single arson-murder scheme would pass muster under either the jurisprudence of the 10th or the 4th Circuits. *See, e.g., Garbade v. Great Divide Mining & Milling Corp.*, 831 F.2d 212, 214 (10th Cir. 1987) (single discrete scheme not "pattern"); *FLIP Mortgage Corp. v. McElhane*, 841 F.2d at 538 (single business scheme not "pattern"); *HMK Corp. v. Walsey*, 828 F.2d 1071, 1073-74 (4th Cir. 1987) (single development scheme not "pattern"), *cert. denied*, 107 S. Ct. 706 (1988). Such a result is both "absurd" and "surpris-

construction" was mandated. 115 Cong. Rec. 9,568, 9,571 (1969).[18] The Organized Crime Control Act, which included S. 1861 in Title IX, then passed the Senate by a vote of 73 to 1. 116 Cong. Rec. 972 (1970).

While the legislation was pending in the House, the House Judiciary Committee was well aware of its scope. Indeed, the Association of the Bar of City of New York objected to its reach beyond "organized crime," including its application to "any securities fraud case."[19] Yet the House Committee deliberate-

[18] The statement of Finding and Policy did not mention "fraud." That consideration was added when the bill was reported out after the inclusion in the bill by the Senate Committeee of various additional predicate offenses, including mail and wire fraud and securities fraud. S. Rep. No. 617, 91st Cong., 1st Sess. 1, 21 (1969).

[19] *House Hearings*, at 294 ("sweep far beyond the field of organized crime"); 329 ("any securities fraud case"); *see generally, Civil Action* at 272-73.

An impression is apparently widespread in the securities industry that RICO "overlaps" all securities fraud. This impression is mistaken. RICO says "offenses" involving "fraud in the sale of securities" are "punishable under any law of the United States." 18 U.S.C. § 1961(1)(D) (1982). "Offense" means a breach of the *criminal* laws. *Dan River, Inc. v. Icahn*, 701 F.2d 278, 291 (4th Cir. 1983) ("Criminal intent is . . . necessary to either mail fraud or securities fraud [under RICO]"). Accordingly, only the securities acts' *criminal* fraud provisions fall within RICO. *See, e.g.*, Securities Act of 1933 § 24, 15 U.S.C. § 77x (1982) ("willfully"); Securities and Exchange Act of 1934 § 32, 15 U.S.C. § 78ff ("'willfully"). Merely negligent or strict liability conduct does not fall within RICO. *See Aaron v. SEC*, 446 U.S. 680, 701-02 (1980) (intent to defraud rather than negligence in violations of § 17(a)(1) of the 1933 Act, § 10(b) of the 1934 Act, but not when engaging in untrue statements or omissions or transactions that operate as a fraud under § 17(a)(2) and § 17(a)(3) of the 1933 Act). Some overlap between statutes "is neither unusual nor unfortunate." *SEC v. National Securities, Inc.*, 393 U.S. 453, 468 (1969). Indeed, the securities acts envision it. *See, e.g.*, Section 28(a) of the Securities and Exchange Act of 1934 § 28, 15 U.S.C. § 78bb(a) ("rights and remedies" "in addition" to "any and all other rights"

President signed the Bill, as was expected in light of his earlier endorsement of its basic concepts.

F. The Text of RICO Does Not Support a Narrow Interpretation of the Pattern Requirement.

RICO does not define "pattern." Thus, "pattern" ought to be read in its plain or ordinary meaning, and interpreted in the context of the entire statute. *Sedima*, 473 U.S. at 495 n.13; *Russello*, 464 U.S. at 20, 21; *Turkette*, 452 U.S. at 580, 583 n.5 587. *See*, Equitable Relief at 535 n.37 (analyzing text of statute and lower court jurisprudence); note, *Reconsideration of Pattern in Civil RICO Offenses*, 62 NOTRE DAME L. REV. 83, 93-96 (1986) (cited with approval in *Sun Savings & Loan Ass'n v. Dierdorff*, 825 F.2d 187, 192 (9th Cir. 1987). Nothing in the text, legislative history or policy of the statute warrants the adoption of the sort of multiple scheme limitation read into the statute by the 8th Circuit.

G. Sedima's Footnote 14 Does Not Support the Eighth Circuit's Narrow Interpretation of the Pattern Requirement.

Apart from its observation that two acts may not be sufficient to form a "pattern," *Sedima's* footnote 14 is inclusive and not limiting. After an inconclusive survey of the relevant legislative history, this court said:

> Significantly, in defining "pattern" in a later provision of this same bill, Congress was more enlightening: "Criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." 18 U.S.C. § 3575(e). This language may be useful in interpreting other sections of the act. *C.S. Iannelli v. United States*, 420 U.S. 770, 789, 95 S.Ct. 1284, 1295, 43 L.Ed. 2d 616 (1975).

ing." *Turkette*, 452 U.S. at 587. Obviously, it is not what Congress – or Senator Dole – had in mind in 1970. *See also* 116 Cong. Rec. 607 (1970) (statement of Sen. Byrd) (arson-murder attempt to force A & P Tea Co. to buy detergent).

The above definition clearly is the definition of "pattern" that this Court favored in *Sedima*. The court says explicitly that Congress' action in adopting that definition was significant, and that that definition may be useful "in interpreting other sections of the act," including the pattern requirement of § 1962. Using the disjunctive "or," this court, in footnote 14, allowed at least six separate and independent grounds for finding a "pattern." That is consistent with the liberal, remedial understanding of the RICO statute presented by the court in *Sedima*. It would be anomalous for the court to have suggested a restrictive interpretation of "pattern" in a footnote when the spirit of the decision is remedial and broad.

II. A NARROW CONSTRUCTION OF RICO'S PATTERN REQUIREMENT WOULD DEPRIVE MANY CRIME VICTIMS OF A POWERFUL REMEDY

Article III of the Constitution does not grant a court power to redraft legislation because of its "appraisal of the wisdom and unwisdom of a particular [legislative] course . . . ." *Diamond v. Chakrabarty*, 447 U.S. 303, 318 (1980) (quoting *TVA v. Hill*, 437 U.S. 153, 194 (1978)).

Nevertheless, an examination of the policy considerations implicated by Congress' chosen course of action in 1970 is required by this Court's jurisprudence indicating that plain

meaning may be departed from to avoid absurd or surprising results. *See, e.g., United States v. Ryan*, 284 U.S. 167, 175-76 (1931) (civil forfeiture provision narrowed to give it "a sensible construction"). The language chosen by Congress in RICO is "neither absurd nor surprising." *Turkette*, 452 U.S. at 587. *See also In Re Rouse*, 221 N.Y. 81, 91, 116 N.E. 782, 785 (1917) (Cardozo, J.) ("consequences cannot alter statutes but may help to fix their meaning.")

The current controversy over RICO has not centered on its criminal provisions or its possible civil application in the areas of violence, the provision of illicit goods and services, or the corruption of unions and governmental entities. Instead, the controversy has focused almost exclusively on the commercial fraud area. In 1970, however, Congress focused RICO on "fraud." 84 Stat. 922. It found that traditional "sanctions and remedies" were "unnecessarily limited in scope and impact." Id. at 923. It was well aware, in short, that "existing law, state and federal, was not adequate. . . ." *Turkette*, 452 U.S. at 586. Although almost two decades have passed since RICO became law, the task remains a formidable one.

In 1974, the Chamber of Commerce of the United States published a comprehensive study of fraud. The Chamber estimated the direct economic cost of fraud as follows:

	Billions of Dollars
1. Bankruptcy Fraud	.08
2. Bribery, Kickbacks & Payoffs	3.00
3. Consumer Fraud	21.00
4. Embezzlement	7.00
5. Insurance Fraud	2.00
6. Receiving Stolen Property	3.50
7. Securities Theft and Frauds	4.00

The total figure, including credit card and theft fraud ($1.10 billion) and computer-related crime ($.10 billion), was estimated at $41.78 billion annually.[21] Given the inflation rate since the 1974 study, fraud likely costs society a figure more than four times that high today.[22]

In addition, the Chamber of Commerce study did not account for the entire scope of the impact of fraud on the economy. By interacting with society's other problems, such as poverty and discrimination, white-collar crime has a "serious influence on the social fabric, and on the freedom of commercial and interpersonal transactions."[23] Because white-collar offenders often occupy positions of trust, the effects of their misdeeds extend beyond their immediate impact, which often falls most harshly on the poor, aged and uneducated, as noted by the Crime Commission in 1967. Former FBI Director William H. Webster aptly commented in 1982: "[T]hrough use of their positions of trust, cunning and guile, white collar criminals undermine professional and government integrity to the dismay of all, and ultimately are responsible for the loss

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[21] United States Chamber of Commerce, *White Collar Crime: Everyone's Problem, Everyone's Loss* (1974) (cited as *White Collar Crime*). Obviously, these estimates can only be "ballpark" figures, for the typical perpetrator of a fraud does not file an honest "annual report." It has been accurately noted that "there is little systematic data available regarding the incidence of white collar crime," and two estimates of its cost have been cited: loss of taxes on $25 to $40 billion of unreported income annually and $500 million to $1 billion annually in securities fraud. President's Comm. on Law Enforcement & Admin. of Justice Task Force Report: *Crime and Its Impact – An Assessment* 103 (1967).

[22] Annual Report of the U.S. Attorney General 42 (1985) ($200 billion).

[23] *See generally* Edelhertz, *The Nature, Impact, and Prosecution of White Collar Crime* 6-7 (1970) (cited as Edelhertz).

of billions of dollars annually from the nation's economy."[24] Consumers, savers, investors, legitimate businesspeople and governments are the victims of fraud.

For instance, an estimated 15 to 20 percent of all insurance claims are fraudulent for a total loss of over $11 billion annually.[25] Because an insurance company must generate approximately $1.25 in premiums for every $1 it pays in claims, policy holders are paying an extra $13.75 billion in premiums annually because of fraud.

Arson-for-profit is a particularly costly part of the insurance fraud problem. In 1978, it was estimated that arson fraud caused losses of up to $2 billion a year and that 25% of each person's insurance bill goes to cover these losses.[26] More significantly, in 1975 alone, 1,000 deaths, including 45 firefighters, resulted from arson-for-profit schemes.[27]

Commodities and securities markets are tainted by fraud. It is estimated that $200 million is lost each year through commodity investment fraud.[28] Widespread reports of insider trading on Wall Street, too, have only recently highlighted a problem that costs investors, stockholders, and employees dearly, especially where corporate takeovers are involved.

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[24] *Hearings on the Department of Commerce, Justice, and State, The Judiciary and Related Agencies: Appropriations for 1983,* Before a Subcomm. of the Comm. on Appropriations, House of Representatives, 97th Cong., 2nd Sess. 1078 (1982).

[25] N.Y. TIMES, July 6, 1980, at 27, col. 1. These individual figures, too, are considerably higher than the 1974 general estimate of the Chamber of Commerce. *See supra* n.22.

[26] *Arson-for-Hire, Hearings before the Perm. Subcomm. on Investigations of the Senate Comm. on Government Affairs,* 95th Cong., 2d Sess. 7 (1978) (statement of Sen. John Glenn).

[27] *Id.*

[28] *See* Senate Comm. on Governmental Affairs, *Commodity Investment Fraud,* S. Rep. No. 495, 97th Cong., 2d Sess. V (1982).

Such abuse of insider information may well taint many of the 3,000 takeover transactions that occurred in 1986 alone, involving $175 billion.[29] The continuing federal investigation most likely "will vastly understate the total losses incurred by stock market investors, as well as many target companies that no longer exist and their acquirers who doubtless paid too dearly for them."[30]

A nationwide problem of bank failures caused by criminal conduct is also of "epidemic proportions."[31] From 1980 to 1981, 105 banks and savings and loan associations failed, costing taxpayers $1 billion. Subsequent failures are estimated to have added another $1 billion to the total.[32] A record 145 banks failed in 1986, and the figure was expected to increase by 25% for 1987. At least one half of bank failures and one quarter of thrift failures involve criminal activity by insiders.[34]

Fraudulent financial reporting is a serious national problem. Since 1980, major accounting firms have had to pay more than $180 million to settle liability suits.[35] When fraudulent financial reporting occurs, widespread consequences result, "with a sometimes devastating ripple effect."[36]

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[29] WALL ST. J., Feb. 17, 1987, at 27, col. 1. *See generally* BUS. WK., Mar. 3, 1987, at 28; NEWSWEEK, May 26, 1986, at 44.

[30] WALL ST. J., Feb. 17, 1987, at 27, col. 1.

[31] N.Y. TIMES, Jan. 22, 1987, at 45, col. 1.

[32] House Comm. on Government Operations, *Federal Response to Criminal Misconduct and Insider Abuse in the Nation's Financial Institutions,* H.R. Rep. No. 1137, 98th Cong. 2d Sess. 5 (1984) (cited as *Insider Abuse*).

[33] N.Y. TIMES, Jan. 22, 1987 at 45, col. 1.

[34] *Insider Abuse* at 5.

[35] TIME, Sep. 21, 1986, at 61.

[36] Report of the National Commission on Fraudulent Financial Reporting 4 (1987).

Fraud against the government, not included in the Chamber of Commerce's study, costs anywhere from $2.5 to $25 billion.[37] In 1978, the Comptroller General reported that the opportunities for defrauding the government were "virtually unlimited."[38] A 1980 update concluded that the problem remained widespread.[39]

Ironically, the second circuit in *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 741 F. 2d 482 (1984), *rev'd* 473 U.S. 479 (1985), declaring the "extraordinary, if not outrageous" "uses to which private civil RICO has been put," cited E.F. Hutton & Co. among the "respected and legitimate" companies that have been sued. In 1986, Hutton pleaded guilty to 2,000 counts of mail fraud in a multi-million dollar bank scam. *See, e.g.*, BUS. WK., February 24, 1986, at 98, col. 1. In May 1988, Hutton agreed to plead guilty to two felony counts of money laundering and one of conspiracy. WASH. POST, May 7, 1988, at D11, col. 5. There is a substantial body of literature on white-collar crime by so-called respected business. *See, e.g.*, "How Lawless Are Big Companies?", FORTUNE, December 1, 1980, at 57 (1,043 major corporations between 1970 and 1980: 117 convictions or consent decrees on 98 antitrust violations; 18 kickbacks, briberies or illegal rebates; 21 illegal political contributions; 11 frauds; and five tax evasions).

The fraud problem facing the nation is overwhelming, but it is not unsolvable. If RICO is used with other law enforcement tools, it can emerge, as Congress intended, as an effec-

[37] N.Y. TIMES, May 17, 1982, at 11, col. 2 ("Fraud in Government benefit programs is now widely viewed to be a serious national problem . . . cost[ing] the public anywhere from $2.5 to $25 billion per year.").

[38] General Accounting Office, *Federal Agencies Can and Should Do More to Combat Fraud in Government Programs* i (1978).

[39] General Accounting Office, *Fraud in Government Programs: How Extensive Is It? – How Can it be Controlled?* (1980).

tive means for combatting fraud as well as other forms of sophisticated crime. For "[i]f substantial progress can be made in the prevention, deterrence and successful prosecution of . . . [white collar] crimes, we may reasonably anticipate substantial benefits to the material and qualitative aspects of our national life."[40]

Narrowing RICO would substantially cripple the statute's ability to achieve its remedial purposes. Congress recognized when it passed RICO in 1970 that existing jurisprudence was inadequate to deal with organized crime activities, including fraud. Society cannot rely, for example, upon public enforcement to bear the entire burden of policing fraud. Justice Jackson observed over 45 years ago that "[t]he criminal law has long proved futile to reach the subtle kinds of fraud at all, and able to reach grosser fraud, only rarely."[41] Public agencies charged with regulating fraud will never be funded or staffed at adequate levels.[42] Civil RICO's private enforce-

[40] Edelhertz at 11.

[41] Jackson, *The Struggle for Judicial Supremacy* 152 (Vintage ed. 1941). Fraudulent activities have increased dramatically since Justice Jackson's observation, and resources available for the investigation and prosecution of white collar crime remain scarce. Former FBI Director William Webster aptly commented in 1981 that "you speak to a thirsty man in the desert when you ask . . . [about resources]. Of course we need more resources consistent with the economy's ability to supply it and the willingness of the American people to dedicate it." *Waterfront Corruption: Hearings Before the Perm. Subcomm. on Investigations, Comm. on Governmental Affairs*, 97th Cong., 1st Sess. 18 (1981).

[42] While the funding of the Securities and Exchange Commission has increased since 1979, its staffing has decreased and pending investigations are down. The number of shares traded on the New York Stock Exchange, however, has increased 300% since 1977. *See generally* General Accounting Office, *Statistics on SEC's Enforcement Program*, March 25, 1985.

Similarly, the 139.9 million futures contracts traded in 1983 is 15 times greater than the number traded in 1968. The resources of the Commodity Futures Trading Commission have nonethe-

ment mechanisms, therefore, play an essential role in reaching the fraud and other forms of criminal conduct that escape the criminal justice system. Accordingly, the statute's private civil provisions are necessary if the nation is successfully to combat and deter fraudulent activities. Private lawsuits with the threat of treble damages may, in fact, be more effective in combatting fraud than the threat of criminal penalties. Empirical studies, for example, show that it is the threat of treble damages, not criminal prosecution, that is the backbone of the antitrust statutes.[43] Testimony presented to Congress by the Department of Justice indicated:

> [C]ivil RICO's utility against continuous large-scale criminality not involving traditional organized crime elements should be kept in mind. These considerations suggest that private civil RICO enforcement in areas of organized criminality may have had a greater deterrent effect than is commonly recognized, and that both the threat and the actuality of private civil enforcement might be expected to produce even greater deterrence in the future. [Trott at 140-41 (emphasis added).]

Narrowing civil RICO would, therefore, deprive many fraud victims of a potent weapon for use against those who have wronged them. Courts ought not rewrite RICO and frustrate this remedial purpose.

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less remained relatively constant. The Commission is "thoroughly outgunned in the ongoing battle against commodity fraud." S. Rep. No. 495, 97th Cong., 2d Sess. 10 (1983).

[43] "Neither imprisonment nor monetary penalties pose . . . a credible threat to colluding firms . . .[t]he deterrent effect . . . [comes] from . . . the likelihood of an award of private treble damages . . . ." Block, Nold & Sidale, *The Deterrent Effect of Antitrust Enforcement*, 89 J. Pol. Econ. 429, 440 (1981).

Nor is the potential for litigation abuse an acceptable reason for narrowing the scope of civil RICO.[44] Allegations of civil RICO abuse should be dealt with by enforcing vigorously the existing remedies for general litigation abuse. RICO abuse will not be a problem so long as attorneys and the courts "recognize the utility of existing remedial procedures."[45] The courts, too, should also be alert to the fact that "abuse arguments are more likely motivated by hostility to the RICO remedy"[46] than by the character of the suit. As Justice Stevens observed in the context of the antitrust laws, "[F]rivolous cases should be treated as exactly that, and not as occasions for fundamental shifts in legal doctrine." *Hoover v. Ronwin*, 466 U.S. 558, 601 (1984) (Stevens, J., dissenting). He continued:

> Our legal system has developed procedures for speedily disposing of unfound claims; if they are inadequate to protect [individuals] from vexatious

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[44] Those who express this concern have the burden of proving:

1) that a *substantial* number of frivolous RICO suits are being filed,

2) that *existing* safeguards against such suits are not adequate to remedy them,

3) that *new* safeguards against such suits that are adequate *cannot* be designed, and

4) that the detriment from these suits *outweighs* the benefit from legitimate suits.

None of these burdens has been met.

[45] Goldsmith & Keith, *Civil RICO Abuse: The Allegations in Context*, 1986 B.Y.U. L. Rev. 55, 103 (1984). (cited as *RICO Abuse*). The 1983 meeting of the United States Judicial Conference concluded that "the existing tools [to address frivolous litigation] are sufficient, but perhaps not fully understood or utilized." *Report of the Proceedings of the Judicial Conference of the United States*, September 21-22, 1983, at 56.

[46] *RICO Abuse* at 104.

litigation, then there is something wrong with those procedures, not with the law . . . . *Id.*

Finally, lower courts have frankly acknowledged that their narrow reading of RICO is motivated in part by a fear of a "flood of litigation." *See, e.g., McCarthy v. Pacific Loan, Inc.*, 600 F.Supp. 137, 139 (D. Haw. 1984). Such fears are misplaced factually and are constitutionally inappropriate.

The perceived problem of the civil RICO case load is exaggerated.[47] Of the approximately 160,000 private civil suits filed in federal courts each year, considerably fewer than 5,000 are even potential RICO cases.[48] This potential figure would represent, if fully realized, less than 3% of all federal filings. Moreover, over 58% of the reported civil RICO cases filed between January 1, 1985 and December 31, 1986 had an independent basis for federal jurisdiction.[49] Thus, many civil RICO cases would have found their way to the federal courthouse in any event.

But more importantly, the possibility that litigation might be a burden on courts is "not sufficient to justify a judicial decision to alter [a] congressionally [drafted remedial scheme]." *Patsy v. Board of Regents of State of Florida*, 457 U.S. 496, 512 n.13 (1982). It is a legislative function to resolve "the

[47] *See* 2 Civil RICO Report No. 34 at 3. (Feb. 4, 1987) (remarks of Judge Pamela A. Rymer).

[48] *See* Annual Report of the Director of the Administrative Office of the U.S. Courts (1985). Securities, commodities and exchange related findings include 3,200 civil cases. *Id.* at A-13 & A-46. Fraud-related litigation accounts for 1,700 civil filings. *Id.* at A-12. If all these securities and fraud cases were also RICO cases, RICO filings would not exceed 5,000. In fact, Administrative Office data indicate that RICO filings are only running from 85 to 90 per month. *Equitable Relief* at 622.

[49] *Equitable Relief* at 619.

pros and cons of whether a statute should sweep broadly or narrowly." *United States v. Rodgers*, 466 U.S. 475, 484 (1984). Congress resolved those "pros and cons" when it stated unambiguously that RICO is to be construed broadly. While "[t]he sweep of RICO is admittedly broad . . . [a court's] function is to apply the language of the statute as drafted in Congress, not to rewrite the statute as [the court] might prefer it to be." *Morgan v. Bank of Waukegan*, 804 F.2d 970, 974 (7th Cir. 1986). A court may not restrict the scope of civil RICO simply because it may dislike the statute's "extraordinary breadth." *Id.* at 977.[50] In short, if RICO is to be narrowed, it should be narrowed by Congress, not the judiciary.[51]

CONCLUSION

Congress directed in 1970 that RICO be liberally construed to effectuate its remedial purposes. One of RICO's remedial purposes is to provide fraud victims with a private cause of action. Civil RICO's private enforcement mechanisms are necessary if victims of fraud are to be compensated for crimes perpetrated against them. This Court should, therefore, resist the efforts of the lower courts to construe civil RICO narrowly and follow Congress's liberal construction mandate.

Respectfully submitted,

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[50] *See generally*, Note, *Civil RICO: The Temptation and Impropriety of Judicial Restriction*, 95 HARV. L. REV. 1101 (1982).

[51] Congress is processing legislation. *See generally*, Note, *Congress Responds to Sedima: Is There a Contract Out on Civil RICO*, 19 LOY. L.A. L. REV. (1986) for a review of the various proposals.

Supreme Court, U.S.
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No. 87-1252

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

H.J. INC., A Minnesota corporation, KIRK DAHL, LARRY KRUGEN and MARY KRUGEN, individually and d/b/a PHOTO IMAGES, SUSAN DAVIS, ROBERT NEAL, ISSAC H. WARD, RICHARD L. ANDERSON, THOMAS J. MOTT, and all others similarly situated,

Petitioners,

vs.

NORTHWESTERN BELL TELEPHONE COMPANY, a subsidiary of U.S. West, A.B.C. individually and D.E.F. as corporations, and other unnamed Co-conspirators,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

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IN THE

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

STATEMENT OF INTEREST[1]

Abusive use of the Racketeering Influenced and Corrupt Organizations Act (hereinafter referred to as

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[1] This brief is filed with the written consent of the parties pursuant to Supreme Court Rule 36.2. The parties' consent letters have been filed with the Clerk of this Court.

"RICO") against legitimate businesses is pervasive and well recognized.[2] RICO's provision for treble damages and attorney's fees awards in civil cases was enacted as an aggressive initiative to inhibit organized criminal activity and to protect legitimate businesses from victimization by organized crime.[3] Instead, RICO's civil remedies have incited a multitude of litigation against legitimate, respected businesses for alleged wrongful conduct which bears little resemblance to organized criminal activities or the other evils Congress sought to expurgate.[4] The "extraordinary"[5] uses to which RICO has been put stem in great part from the sweeping scope of its provisions, and specifically, from an overly expansive interpretation by many courts of what constitutes a "pattern of racketeering activity" under RICO, and what, therefore is within RICO's ambit.[6]

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[2] *E.g.*, Lacovara & Arnow, *The Legal Shakedown of Legitimate Business People: The Runaway Provisions of Civil RICO*, 21 New Eng. L. Rev. 1 (1985-86).

[3] Organized Crime Control Act of 1969, Senate Rep. No. 617, 91st Cong., 1st Sess. 76 (1969) (hereinafter referred to as "S. Rep.") as cited in *Sedima S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 517 (1985) (Marshall, J., dissenting).

[4] *Sedima S.P.R.L.* v. *Imrex Co.*, 473 U.S. at 499 ("It is true that private and civil actions are being brought almost solely against [legitimate businesses], rather than against the archetypal, intimidating mobster."); *see also id.* at 506 (Marshall, J., dissenting) ("Only 9% of all civil RICO cases have involved allegations of criminal activity normally associated with professional criminals. [Cite omitted]. The central purpose that Congress sought to promote through civil RICO is now a mere footnote.").

[5] *Sedima S.P.R.L.* v. *Imrex Co.*, 473 U.S. at 500.

[6] RICO provides, *inter alia*:

> (a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern of racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.
>
> (b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or in the activities of which affect, interstate or foreign commerce.
>
> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.
>
> (d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

18 U.S.C. § 1962.

The question of the appropriate standard to use in determining what conduct constitutes a pattern of racketeering activity is now before this Court. A standard which is not sufficiently tailored to the intent of Congress will, at the least, perpetuate RICO abuses. Businesses, their reputation threatened with the stigmatizing label of being "racketeers," and their pockets threatened with the possibility of extended litigation and treble damages, will increasingly settle even unfounded disputes, as well as disputes involving conduct far less odious than racketeer-

ing activity.[7] The effect has been, and will be, to injure those lawful businesses which RICO sought to protect.

As the largest federation of American businesses, the U.S. Chamber of Commerce (hereinafter referred to as the "Chamber") is greatly concerned with the indiscriminate expansion of civil RICO litigation and has testified before Congress regarding this issue.[8] The Chamber represents more than 180,000 corporations and partnerships, as well as several thousand trade associations and state and local chambers of commerce. Many of the Chamber's members who are well respected in the business community have been faced with civil RICO claims.[9] Neither the Chamber nor its members condone any kind of unlawful or unethical conduct, regardless of the legitimacy of the business itself. However, the Chamber and its members believe that legitimate enterprises should not be subject to RICO liability for behavior which does not amount to the type of activity Congress intended to

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[7] *See Sedima S.P.R.L.* v. *Imrex Co.*, 473 U.S. at 506 (Marshall, J., dissenting) ("Many a prudent [RICO] defendant, facing ruinous exposure, will decide to settle even a case with no merit.").

[8] *Statement of the Chamber of Commerce of the United States on Racketeering Influenced and Corrupt Organizations Act*, Before the Criminal Justice Subcommittee of the House Judiciary, Oct. 9, 1985.

[9] Many of the following businesses which have faced RICO claims are members of the Chamber:

Bear Sterns & Co., Dean Witter Reynolds, Merrill Lynch, Pierce Fenner & Smith Inc., Morgan Stanley & Co., Inc., Oppenheimer & Co., American Express, Inc., Thompson McKennon Securities, Inc., Arthur Anderson & Co., Coopers & Lybrand, Ernst & Whinney, Laventhol & Horwath, Peat, Marwick Main Co., Price Waterhouse, Touche Ross & Co., Citibank, N.A., Wells Fargo, First American Bankshares, Inc., First Interstate Bank of Oregon, First National Bank of Maryland, Allstate Insurance Co., Prudential Insurance Co. of America, Travelers Insurance Co., USLIFE Corp., Boeing Co., General Dynamics Corp., General Motors Corp., Mitsui & Co., Inc., Rockwell International Corp., and Rohn & Haas Co.

reach, and which is adequately addressed by other existing laws.[10]

STATEMENT OF THE CASE

This case arises out of a class action under the Racketeering Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968, against Northwestern Bell Telephone Co. (hereinafter referred to as "Northwestern Bell"). It was alleged that Northwestern Bell committed various acts, including bribery, to illegally influence the Minnesota Public Utilities Commission (hereinafter referred to as "MPUC") in its determination of several rate cases. The MPUC is the regulatory body responsible for determining the rates Northwestern Bell may charge.

The District Court found that the First Amended Complaint failed to adequately allege a pattern of racketeering within the meaning of RICO, and dismissed the RICO counts of the Complaint. The District found that only one criminal scheme had been alleged. On Motion for Reconsideration, the Court affirmed.

The United States Court of Appeals for the Eighth Circuit, *en banc*, affirmed the lower court's ruling and denied rehearing. The Eighth Circuit held that an allegation of a single scheme to illegally influence the MPUC did not meet the two-pronged requirement necessary to establish a pattern of racketeering activity under RICO, based on this Court's opinion in *Sedima S.P.R.L.* v. *Imrex Co.*, 473 U.S. at 496 n.14.

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[10] There already exists adequate state and federal criminal laws to deal with malfeasance engaged in by business and civil remedies to provide relief to those injured. RICO is an exceptional statute that should be limited as intended by Congress.

SUMMARY OF ARGUMENT

To combat the infiltration of organized crime into American business, Congress enacted RICO. RICO provides, *inter alia*, an exceptional civil remedy of treble damages and attorneys fees to any person injured by an enterprise engaged in a "pattern of racketeering activity." After RICO's enactment, business became faced with enormous liability for alleged wrongful conduct which bore little resemblance to the organized criminal activity which Congress was attempting to address. In fact, that conduct is already adequately addressed by other federal and state statutes.

In *Sedima*, this Court noted that one way civil RICO liability could be properly limited was by courts appropriately defining what was meant by RICO's reference to a "pattern of racketeering activity." However, in the years since *Sedima*, the lower courts have failed to develop a unified, coherent definition of "pattern." Instead, three very different judicial standards have emerged. One is loose, and allows two acts to demonstrate a "pattern." Another standard is strict, and requires more than one scheme before finding a "pattern." The third standard attempts to balance all the facts of each case to determine if they indicate the type of situation Congress sought to address in requiring a "pattern."

This case presents an ideal opportunity for this Court to resolve the conflicting standards for determining what conduct constitutes a "pattern of racketeering activity," and therefore, what conduct is appropriately within the ambit of civil RICO. The Chamber proposes a standard which combines the strict view with the balanced view. Such a standard fulfills the purposes underlying RICO, yet also limits inappropriate and abusive applications of RICO. In proposing this standard, the Chamber takes no position as to the culpability of the Respondents in this case.

ARGUMENT

I. A UNIFORM STANDARD TO DETERMINE WHAT CONDUCT CONSTITUTES A "PATTERN OF RACKETEERING ACTIVITY" IS NEEDED TO CURTAIL THE INAPPROPRIATE USES OF RICO

To forestall a rampant infusion of organized crime into commerce, and its resulting injurious effect upon American business, Congress enacted RICO. S. Rep., *supra* note 3. RICO provided, *inter alia*, new civil remedies in a potent initiative to curtail organized criminal activity and to protect legitimate business from victimization through infiltration, unfair competition, and massive fraud. *Id.* The RICO civil remedy provides for the award of treble damages and attorney's fees to any person injured in his business or property by an enterprise engaged in a "pattern of racketeering activity." 18 U.S.C. § 1964(c).

As recognized by this Court, RICO has evolved since its enactment in 1970 into "something quite different from the original conception of its enactors." *Sedima*, 473 U.S. at 500.[11] In fact, a survey conducted by the American Bar American Ad Hoc Civil RICO Task Force in 1985 found that only nine percent of allegations under civil RICO involved offenses which are associated with professional criminal activity.[12] The great majority of

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[11] The Fifth Circuit has aptly described the resulting situation: The scope of the civil RICO statute is breathtaking. An allegation of fraud in a contract action can transform an ordinary state law claim into a federal racketeering charge. *R.A.G.S. Couture, Inc.* v. *Hyatt*, 774 F.2d 1350, 1355 (5th Cir. 1985).

[12] The ABA Report found that of 270 known civil RICO cases at the trial court level, 40% involved securities fraud, 37% common-law fraud in a commercial business setting, and only 9% allegation of criminal activity of a type generally associated with professional criminals. ABA Section of Corporation, Banking & Business Law, Report of the Ad Hoc Civil RICO Tack Force, 55-57 (1985) (hereinafter referred to as "ABA Report"). One commentator has noted

civil RICO actions are brought against legitimate businesses in ordinary commercial settings.[13] This expatiation of RICO's intended use has resulted in adversely impacting the very interest RICO was designed to protect. Several members of this Court have noted that the extraordinary uses to which civil RICO has been put have taken their toll on commerce. In *Sedima*, Justice Marshall joined by Justices Brennan, Blackmun and Powell, stated that

> [the] results [of such extraordinary uses] distort the market by saddling legitimate business with uncalled-for punitive bills and undeserved [perjorative] labels. To allow punitive actions and significant damages for injury beyond that which the statute was intended to target is to achieve nothing the statute sought to achieve, and ironically to injure many of those lawful businesses that the statute sought to protect.

Sedima, 473 U.S. at 520 (Marshall, J., dissenting). Unlike criminal RICO actions which are subject to the judicious discretion of government prosecutors, the filing of civil RICO actions are free from any restraints and are left to the unfettered discretion of private litigants. The incentive of treble damage awards plus attorney's fees are strong inducements for claimants to file unmeritorious claims against businesses who will settle a suit rather than face the bad publicity attendant to charges of racketeering or expend the time and cost of litigation. As Justice Marshall has noted "[m]any a prudent [RICO] defendant, facing ruinous exposure, will decide to settle even a case with no merit." *Sedima*, 473

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that "[l]awyers say the number of court awards under RICO is not an accurate measure of the problem, because few cases go to trial: The mere threat of a headline suggesting a connection with organized crime often induces a settlement." *Business is Picking Up An AntiCrime Weapon*, Business Week, Feb. 20, 1984, at 85.

[13] *See id.*

U.S. at 506 (Marshall, J., dissenting). "It is thus not surprising that civil RICO has been used for extortive purposes, giving rise to the very evils that it was designed to combat." *Id.*

II. EXISTING STANDARDS FOR DETERMINING A "PATTERN OF RACKETEERING ACTIVITY" DO NOT SUFFICIENTLY ADDRESS THE ABUSE OF CIVIL RICO

As this Court has noted, the inappropriate expansive use of civil RICO[14] could be curtailed by the enunciation of a proper standard for courts to follow in determining what constitutes a "pattern of racketeering activity" under RICO.[15] The creation of such a standard would be an appropriate action of the Court as Congress itself believed that "[t]he concept of 'pattern [was] essential to the operations of the [RICO] statute." S. Rep. 158 as cited in ABA Report, *supra* note 12, at 104. Moreover, the pattern requirement was intended by Congress to keep the impact of RICO liability within the bounds set by Congress, as a counter balance to RICO's liberal interpretation clause. ABA Report, *supra* note 12, at 104.

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[14] "The 'extraordinary' uses to which civil RICO has been put appear to be primarily the result of the breadth of the predicate offenses, in particular the inclusion of wire, mail and securities fraud, and the failure of Congress and courts to develop a meaningful concept of 'pattern.'" *Sedima*, 473 U.S. at 500; *see also id.* at 506 (Marshall, J., dissenting).

[15] Another means by which RICO abuse may be limited is by the vigorous application of Federal Rules of Civil Procedure 9(b) (allegations of fraud must be stated with particularity) and 11 (Counsel of Record must certify that the complaint is well-grounded in fact and is not interposed for any improper purpose, such as to harass). *Goldsmith* v. *Keith, Civil RICO Abuse: The Allegations in Context*, 1986 B.Y.U.L. Rev. 55, 86-87, 96-97 n.178 (1986). An example is *Northern Trust Bank/O'Hare N.A.* v. *Inryco, Inc.*, 615 F. Supp. 828 (N.D. Ill., E.D. 1985). In that case a trustee filed suit alleging that a contractor and others violated RICO when they participated in

In *Sedima*, this Court discussed the general parameters of the pattern requirement and found that two issues must be addressed: relationship and continuity.[16] This Court based its analysis on (1) the Congressional intent underlying the pattern requirement and (2) the common meaning of pattern. See *id.* Since *Sedima*, however, the lower federal courts have been unable to agree on the proper scope and impact of *Sedima*'s two-pronged analysis, and have generally ended up extending, rather than restricting, RICO's reach. *Sun Sav. & Loan Ass'n* v. *Dierfdorff*, 825 F.2d 187, 197 (9th Cir. 1987). The discussion regarding the pattern requirement has moved away from *Sedima*'s analysis and instead focused on the semantic distinctions among act, activity, episode, scheme, and effort. *See* Note, *Civil RICO—The Pattern of Racketeering Requirement: Louisiana Power and Light v. United Gas Pipeline*, 8 Energy L.J. 105, 108 n.35 (1987).[17] Among the federal courts, three major standards for determining what conduct constitutes a pattern of racketeering activity have emerged—referred to herein as the "liberal" standard, the "conservative" standard,

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a construction contract scheme. The contractor moved to dismiss under, *inter alia*, Rule 9(b). Although the Court did not reach the issue of Rule 9(b) as it dismissed the complaint on other grounds, it stated that the "[t]rustee and its counsel will be well advised to bear in mind their obligations under Rule 11 before they opt to include [the contractor] in an amended RICO complaint." *Id.* at 835.

[16] *Sedima*, 473 U.S. at 496 n.14 (quoting S. Rep. 158) ("It is this factor of *continuity plus relationship* which combines to produce a pattern.").

[17] *See, e.g., Northern Trust Bank/O'Hare, N.A.* v. *Inryco, Inc.*, 615 F. Supp. at 831 ("[The word pattern] connotes a multiplicity of events: Surely the continuity in the term presumes repeated criminal *activity*, not merely repeated *acts* to carry out the same criminal activity. It places a real strain on the language to speak of a single fraudulent effort, implemented by several fraudulent acts, as a 'pattern of racketeering activity.'") (emphasis added); *cf. Sun Sav. & Loan Ass'n* v. *Dierfdorff*, 825 F.2d at 193 ("RICO requires repeated *acts*, not repeated *activity*.").

and the "judicious" standard. *Louisiana Power & Light Co.* v. *United Gas Pipe Line Co.*, 642 F. Supp. 781, 808 (E.D. La. 1986).

A. The Liberal Standard

The "liberal" standard does not truly adopt *Sedima*'s two-pronged analysis as a requirement for finding a RICO violation. It allows any two related acts of racketeering activity to establish a pattern of such activity. *See R.A.G.S. Couture, Inc.* v. *Hyatt*, 774 F.2d 1350 (5th Cir. 1985). Continuity is discussed only in terms which negate its effect. *E.g., Sun Sav. & Loan Ass'n* v. *Dierfdorff*, 825 F.2d at 194 n.5 (cited at Petitioners' Brief 34).[18] As its rationale, this approach relies heavily on the RICO definition of "pattern of racketeering activity." *See* Note, *Civil RICO—The Pattern of Racketeering Requirement: Louisiana Power and Light v. United Gas Pipeline, supra* p. 10, at 114-15. That definition provides only that a " 'pattern of racketeering activity' requires at least two acts of racketeering activity . . . [occurring] within ten years." 18 U.S.C. 1961(5).[19]

The "liberal" standard fails to put that "pattern" definition in the proper context—the purpose underlying the pattern requirement. Congress intended the pattern requirement to limit the scope of RICO to apply to defendants who regularly commit racketeering acts. ABA Report, *supra* note 12, at 104, 203-08. "There must

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[18] Note, *The Pattern Requirement of Civil RICO*, 74 Ky. L.J. 623, 636, 642-43 (1985-86); Note, *Civil RICO-The Pattern of Racketeering Requirement: Louisiana Power and Light v. United Gas Pipeline, supra* p. 10 at 110-11; *see also* cases discussed in Ross, *The Pattern Element of RICO Before and After Sedima: A Look at Both Federal and Florida RICO*, 15 Fla. St. U.L. Rev. 321, 332-33, 342-43 (1987).

[19] "Racketeering activity" means, generally, murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in narcotics or other dangerous drugs, counterfeiting, embezzlement, mail fraud, wire fraud, and securities fraud. 18 U.S.C. § 1961(1).

be some indication of a 'threat of continuing activity' by a defendant." S. Rep. 158, as cited in ABA Report, *supra* note 12, at 104-05. Related acts of racketeering which do not indicate that the actor has a propensity for continuing such actions do not satisfy the second prong of *Sedima* and therefore, do not meet the definition of "pattern of racketeering activity" in the context of RICO. Not surprisingly, the application of the "liberal" standard has had inappropriate results.[20]

B. The Conservative Standard

The "conservative" standard, applied by the court below, requires that the defendant's conduct involve two or more efforts or schemes to be subject to RICO. "At a minimum, this standard requires that the [RICO] defendant must harm the plaintiff more than once—it must have committed acts which are ongoing, and which have an independent and repeated harmful significance for the plaintiff." *Louisiana Power & Light Co.* v. *United Gas Pipe Line Co.*, 642 F. Supp. at 809. This standard adopts *Sedima*'s two-pronged analysis and in the vast majority of cases satisfies it. However, the requirement of two separate schemes may fail *Sedima*'s two-pronged analysis if the schemes themselves are not sufficiently connected to show either relationship or continuity.

Further, the line separating one scheme from another may at times be difficult to draw. For example, can one of the schemes consist of only one act? In such a situation, courts would find the definitional problem merely shifted from the concept of pattern to that of scheme. The "conservative" standard has been criticized several times. *See* cases cited in Petitioners' Brief 13-17; *see also*

[20] *E.g.*, In *R.A.G.S. Couture, Inc.* v. *Hyatt*, a clothing manufacturer successfully filed a civil RICO action against two employees for mailing two fraudulent invoices within five months of each other. 774 F.2d 1350. The acts of mailing two fraudulent invoices without more is not the type of activity Congress intended to reach with its exceptional RICO remedy.

International Data Bank v. *Zephin*, 812 F.2d 149, 154-55 (4th Cir. 1897); Ross, *supra* note 18 at 339, 349. Even a court which had adopted the conservative standard has questioned its utility if applied to every circumstance. *Condict* v. *Condict*, 826 F.2d 923, 928-29 (10th Cir. 1987).

C. The Judicious Standard

The third major standard adopted by the courts, the "judicious" standard, does not completely reject the "conservative" standard but instead uses it merely as an aid to analysis. *See International Data Bank* v. *Zephin*, 812 F.2d at 155. The "judicious" standard, examines various factors to determine if the acts alleged are the type which RICO was intended to cover. Such factors include (1) when the acts occurred, (2) what they were, (3) who was harmed, (4) who acted, (5) whether the scheme or schemes have been completed, (6) whether the act(s) or scheme(s) can be repeated, and (7) the likelihood of such repetition. *See* Note, *The Pattern Requirement of Civil RICO*, *supra* note 18, at 632. By examining these factors, the "judicious" standard can be flexible enough to apply to all of RICO's situations. However, it may go too far. The "judicious" standard is necessarily an inexact standard.[21] As the only guide to all interpretations of RICO's pattern requirement, it could be applied in so many ways among the lower courts that, once again, there would be no standard at all, and the same abuses as currently occur would not be prevented.

III. THE CHAMBER'S PROPOSED STANDARD FULFILLS THE PURPOSES UNDERLYING RICO AND LIMITS ITS ABUSES

The most appropriate standard, as proposed by the Chamber, is a hybrid of the "conservative" and "judicious" standards. Such a hybrid would both fulfill the

[21] *Morgan* v. *Bank of Waukegan*, 804 F.2d 970, 977 (7th Cir. 1986) ("[T]his factually-oriented standard . . . is necessarily less than precise. One judge has even analogized this legal test to Justice Stewart's famous test for obscenity—'I know it when I see it.'").

purposes underlying RICO, yet also limit its damaging effect. In resolving the above noted conflicting interpretations of *Sedima* and RICO's pattern requirement, any standard finally adopted must accomplish two things. First, it should fulfill the purposes underlying RICO by being flexible enough to apply to all of RICO's situations. Second, a standard should limit the scope of civil RICO to curtail those abuses that harm the interest of legitimate business which Congress sought to protect. In addressing these two goals, a standard should also be based upon the fact that the concept of pattern was essential to the operation of RICO,[22] and the plain meaning of the word pattern.[23]

The proper starting point in the development of such an appropriate standard is this Court's discussion of "pattern" in *Sedima*. This Court's two-pronged analysis of relationship and continuity provides a framework within which the intent of Congress can be met without overstepping the bounds of that intent or the statute as written. In developing an appropriate standard, care must be taken that the two prongs of the *Sedima* analysis are not forced into internal inconsistency. A finding of relationship must not itself preclude a finding of continuity, and vice versa. *Morgan* v. *Bank of Waukegan*, 804 F.2d at 977.[24] As stated earlier, this Court based

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[22] *See* Organized Crime Control Act of 1969, Senate Rep. No. 617, 91st Cong., 1st Sess. 158 (1969) as cited in ABA Report, *supra* note 12, at 104) ("The concept of 'pattern' is essential to the operation of the statute.").

[23] *See Sedima*, 473 U.S. at 496 n.14, Note, *Reconsideration of Pattern in Civil RICO Offenses*, 6 Notre Dame L. Rev. 83, 89 n.50 (1986); Ross, *supra* note 18, at 334.

[24] "Requiring both continuity and relationship among the predicate acts for the pattern requirement to be met is a sound theoretical concept that is not easily accomplished in practice. This is because the term 'continuity' and 'relationship' are somewhat at odds with one another. Relationship implies that the predicate acts were committed somewhat closely in time to one another, involve the same victim, or involve the same type of misconduct. Continuity, on the other hand, would embrace predicate acts occurring at different points in time or involving different victims. To focus excessively on either continuity or relationship alone effectively negates the remaining prong." *See also*, Ross, *supra* note 18, at 339, 341, 343.

its analysis in part on the common meaning of pattern. In examining the common parlance meaning of pattern to determine relationship, it is clear that individual elements of a pattern must be related by some theme. Such a theme may be demonstrated by a relationship between or among the elements themselves, or by their individual relationships to a separate principal.[25] For example, completely isolated acts of fraud, extortion, and arson, committed by different individuals, should be found to be related where the perpetrators have a relationship to each other in a mutual aim of unlawful profit.[26] Just as well, if the acts are all in furtherance of one common scheme or objective, they are also clearly related.[27]

Although the concept of "pattern," in common usage, need not suggest continuity in time, it is clear that Congress intended to include temporal continuity as part of the RICO pattern requirement. *Sedima*, 473 U.S. at 496

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[25] *See* Ross, *supra* note 18, at 348-49; Goldsmith & Keith, *supra* note 15, at 101 n.184.

[26] *E.g., United States* v. *Elliot*, 571 F.2d 880, 884 (5th Cir. 1978), *cert. denied*, 439 U.S. 953 (1978) ("Simply stated, this is a case involving a group of persons informally associated with the [sole] purpose of profitting from criminal activity."); *see also* cases cited at Note, *The Pattern Requirement of Civil RICO*, *supra* note 18, at 634 n.69; Ross, *supra* note 18, at 328 n.20 and accompanying text.

[27] *See United States* v. *Starnes*, 644 F.2d 673, 678 (7th Cir. 1981) (acts included traveling interstate to commit arson, setting a fire to defraud an insurer, and using the mails to complete the fraudulent scheme) (cited, *inter alia*, at Note, *The Pattern Requirement of Civil RICO*, *supra* note 18, at 634 n.70); Note, *Reconsideration of Pattern in Civil RICO Offenses*, *supra* note 23, at 87.

n.14.[28] Continuity implies a likelihood to engage in further racketeering activity, but not necessarily of the same kind as already engaged.[29] To determine such a likelihood, the acts allegedly already engaged in must be closely examined. Even two schemes do not unavoidably imply continuity.[30] Neither does one scheme necessarily fail to imply continuity.[31] Such an examination should apply the methodology of the "judicious" approach and look to elements of the alleged acts such as (1) when they occurred, (2) what they were, (3) who was harmed, (4) who acted, (5) whether the scheme or schemes have been completed, (6) whether the act(s) or scheme(s) can be repeated, and (7) the likelihood of such repetition.[32]

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[28] *See* Note, *Reconsideration of Pattern in Civil RICO Offenses*, *supra* note 23, at 86 n.20; *see also* Ross, *supra* note 18, at 334; Note, *The Pattern Requirement of Civil RICO*, *supra* note 18, at 637.

[29] *See* Note, *Reconsideration of Pattern in Civil RICO Offenses*, *supra* note 23, at 95.

[30] For instance, a bank employee's scheme to embezzle, along with a completely separate scheme to commit insurance fraud by arson, both completed in the same short period of time, may provide enough monetary gain to allow the perpetrator to flee the country and retire to a life of quiet indolence. However, it could not be said that the employee had committed a pattern of racketeering activity because there is no perceptible threat of continuity.

[31] For example, *United States* v. *Wachmaker* involved a group, the Outlaw Motorcycle Club, associated for the purpose of engaging in drug trafficking and prostitution. 761 F.2d 1459 (11th Cir. 1985), *cert. denied*, 474 U.S. 1101 (1986). A member of the group was indicted for shooting three police officers. The court found that shooting acts occurred in a single criminal episode but nonetheless held that the continuity element was satisfied. *Id.* at 1475. It reasoned that the purpose and nature of the enterprise satisfied the requirement of a threat of continuity because the motorcycle club gang would continue to carry out illicit activities. *Id.*

[32] *See, e.g.*, Note, *The Pattern Requirement of Civil RICO*, *supra* note 18, at 632.

Petitioners argue (Brief 34) that "continuity must be looked at in terms of the ongoingness of the activity when it is occurring rather than at its end when the activity has been discovered. [Citations omitted.]" Such an approach would render the continuity prong of *Sedima*'s analysis a hollow and specious formality. Of any two related acts it can be said that there will be "a threat of continuing activity" as of the first act. *See Sun Sav. & Loan Ass'n* v. *Dierfdorff*, 825 F.2d at 194 n.5 (cited at Petitioners' Brief 34).[33] Petitioners' argument is, therefore, essentially only a moderately restated version of the inappropriately loose "liberal" standard, and must be rejected. See above discussion regarding the "liberal" standard. Even if all predicate schemes have been completed, RICO's legislative history requires that a plaintiff allege some threat of continuing activity. *See* Note, *Civil RICO—the Pattern of Racketeering Requirement: Louisiana Power and Light v. United Gas Pipeline*, *supra* p. 10, at 110-11. For example, if all the alleged predicate acts were only part of a scheme to gain control of an enterprise that by the time of the suit was already under control, continuity could be satisfied by an allegation that the now-controlled enterprise would begin to conduct its affairs by means of racketeering activity.

The Chamber asserts that, in situations where the conservative approach yields questionable results, courts should then apply the "judicious" approach. For instance, in a situation where there is only one scheme and a separate act, or where the two schemes themselves may not truly indicate continuity, the "judicious" analysis of the alleged facts can resolve the remaining doubts. The approach urged by the Chamber both adequately serves

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[33] "The fact that the last of a series of predicate acts may have completed the criminal scheme does not necessarily preclude a finding of continuity. As long as a threat of continuity exists at some point during the racketeering activity, the continuity requirement is satisfied."

the ends of the RICO legislation, and yet protects those legitimate operations meant to be the beneficiaries of RICO's civil liability mechanism.

IV. THE STANDARD ADVOCATED BY THE CHAMBER HAS BEEN APPLIED AND WORKS

Exactly such an approach as recommended herein by the Chamber was adopted in *Temporaries, Inc.* v. *Maryland Nat'l Bank*, 638 F. Supp. 118 (D. Md. 1986) (hereinafter referred to as "*Temporaries*"), to reject a claimed pattern of racketeering activity. The *Temporaries* case arose out of a situation where ten to fifteen communications were alleged to have been made over two months in furtherance of a plan to induce the plaintiff to invest funds in a failing business. *Id.* at 121. The defendant bank asserted that such conduct if true did not constitute a pattern, in that only one scheme was alleged. The court cogently analyzed the RICO pattern requirement in light of this Court's *Sedima* decision.

First, the *Temporaries* court noted that "[t]wo actions . . . standing alone may be insufficient to constitute a pattern under RICO." *Id.* at 122. The court then applied *Sedima*'s two pronged analysis, finding the alleged facts met the various possible definitions of relationship. *Id.* In the course of examining the continuity prong of *Sedima*'s analysis, the court discussed and criticized the "conservative" standard as unnecessarily restrictive. *Id.* at 123. Nonetheless, the court indicated that an analysis could start with counting the number of schemes. *Id.* at 123-24.

The *Temporaries* court noted that, while two or more schemes may yield a pattern, one scheme alone may do so as well. *Id.* at 123. The court also noted that the concept of scheme presented its own definitional requirements. *Id.* Further, the Court provided a list of factors which could help determine continuity. *Id.* at 123 n.1A. The court concluded that its flexible approach would not

only be most compatible with Congressional intent and the common sense, lay usage of pattern, but would also reconcile the standards herein termed "liberal," "conservative" and "judicious." *Id.* at 123-24.

> Such an interpretation would prevent the propelling of isolated schemes of garden variety fraud into the domain of RICO simply because several interstate phone calls were conducted. But it will leave intact the broad remedial purposes of RICO in cases in which Congress intended to provide an extraordinary remedy—those which evidence a true pattern of racketeering activity. *Id.* at 124.

The *Temporaries* court found that the facts therein alleged showed only one scheme which did not have the necessary level of continuity to satisfy RICO's pattern requirement. *Id.* at 124-25. The *Temporaries* opinion demonstrates an appropriate weighing of the relevant facts as presented. This is a reasoned manageable approach which, as in *Temporaries*, rejects unfounded or overbroad RICO claims without doing damage to RICO itself.

CONCLUSION

Having outlined the scope of an appropriate methodology for determining whether a "pattern of racketeering activity" exists for purposes of civil RICO liability, the Chamber takes no position as to the outcome of applying that method in the instant case. The Chamber urges that the Court weigh the relevant factors, and measure the alleged activities of Respondents against the activity Congress was attempting to address in adopting the civil RICO penalty. The Chamber also urges this Court to consider whether allowing Petitioners to continue their action pressing civil RICO liability in this situation would remedy the harm Congress was addressing, or would instead only harm one of the entities Congress had meant to protect.

For all of the foregoing reasons, the Chamber respectfully requests the Court to adopt the standard proposed above as the standard for determining whether a "pattern of racketeering activity" has been properly alleged in any civil RICO case. The Chamber's standard tempers the strict, "conservative" standard of the court below with the balancing "judicious" standard. In short, this standard would satisfy the purposes of civil RICO liability while limiting its abusive, overreaching application. Together with Federal Rules 9(b) and 11, this standard would provide the lower courts with the means to curtail the serious problem which civil RICO liability has become for legitimate businesses.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1987

H.J. INC., *et al.*,

Petitioners,

v.

NORTHWESTERN BELL TELEPHONE COMPANY, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF THE AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1252

H.J. INC., *et al.*,
Petitioners,
v.
NORTHWESTERN BELL TELEPHONE COMPANY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF THE AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICUS CURIAE*

The American Institute of Certified Public Accountants is a national association whose membership is limited to certified public accountants. The Institute has approximately 260,000 members, many of whom are regularly engaged as outside accountants to conduct independent audits of the financial statements of business enterprises.

The Institute has a special interest in addressing the proper construction of the phrase "pattern of racketeering activity" as used in the RICO statute. Misinterpretations of the "pattern" element that some courts have adopted permit plaintiffs to misuse RICO's treble dam-

ages remedy and "racketeer" label and thus foster a severe "danger of vexatiousness different in degree and in kind from that which accompanies litigation in general." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 739 (1975). When independent auditors express opinions on a client's financial statements, they become exposed to RICO actions brought by investors, creditors and others who may claim to have relied upon those statements in making investment decisions that ultimately prove unsatisfactory or in entering into business transactions with the auditor's clients that do not meet expectations. Although claimants often allege that outside professionals were implicated in a "scheme to defraud," accountants become subject to treble damages and the appellation "racketeer" for activity that Congress (and the public) never remotely considered to be indicative of organized, habitual criminality.

In its *Sedima* decision three years ago, this Court stated that *some* defects that permit RICO's overly broad application to ordinary civil litigation are "inherent in the statute as written" and that their "correction must lie with Congress." *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 499 (1985).[1] This Court also observed in *Sedima*, though, that it is appropriate for the courts to confine the reach of the statute by giving the "pattern" element a more "meaningful" focus. *Id.* at 496 n.14, 500. Members of the Institute, therefore, along with other professionals and legitimate businessmen and women, have a vital interest in urging this Court to adopt the Institute's proposed "pattern" standard.

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[1] Congress has not acted during the three years since this Court decided *Sedima*. In that time, the use of civil RICO to transform ordinary civil litigation into treble damage federal suits has accelerated to the point that the Judicial Conference of the United States twice has called upon Congress to narrow the reach of civil RICO substantially. *See* Reports of the Proceedings of the Judicial Conference of the United States at pp. 19, 75-76 (1987). These resolutions belie the attempts by the plaintiffs' bar to downplay the seriousness of the threat RICO poses if not interpreted properly. *See, e.g.*, Brief of *Amicus Curiae* Trial Lawyers for Public Justice In Support of Petitioners ["TLPJ Brief"] at 25-26 & n.48.

SUMMARY OF ARGUMENT

I. While Congress did not specifically define the "pattern" element of RICO, the factors that this Court itself identified in *Russello v. United States*, 464 U.S. 16 (1983), for interpreting undefined terminology in RICO —the plain meaning of the term, the legislative intent as reflected in the legislative history, and the impact of the rule of lenity—all support the conclusion that the "pattern" element requires allegations and proof that the criminal activity was indicative of habitual criminal conduct. The plain and ordinary meaning of "pattern" is that the sample is "typical" or "characteristic." RICO's legislative history, moreover, demonstrates that the "pattern" requirement was a critical part of Congress' effort to focus the statute on the kind of habitual criminal activity that Congress felt it could not reach constitutionally by outlawing membership in organized criminal associations. The proper application of the rule of lenity also supports this construction of "pattern."

II. As this Court also indicated in *Russello*, the meaning of a term can depend on the context and structure of the statute in which it is used. In this instance, the application of the "pattern" standard properly varies depending on the RICO subsection at issue. In each instance, there must be allegations and proof of the necessary "relationship" between the alleged "racketeering acts" and the prohibited effect on an enterprise that RICO seeks to protect from being improperly influenced or corrupted. In addition, there must be sufficient evidence of "continuity" to demonstrate the racketeering acts are "typical" or "characteristic." There must be something more than a single criminal episode or transaction, and there also must be allegations and proof that the continuing criminal activity represents a substantial

part of the defendant's relationship with the enterprise (in cases arising under Sections 1962(a) or (b) of RICO) or of the conduct of the affairs of the enterprise (in Section 1962(c) cases).

III. The other interpretations offered by the courts, the parties, and the *amici* fall short of carrying forth the plain meaning of "pattern" and its purpose in the RICO statute. The so-called "multiple transactions" tests create nebulous standards that, as a practical matter in the modern economic world, add little to the express threshold statutory requirement that there be at least two "racketeering acts" within ten years. The test proffered by the Solicitor General similarly fails to provide a clear and coherent standard that would apply across the board to all types of RICO cases in a manner that carries forth RICO's meaning and purpose.

IV. In contrast, the test we outline provides an articulable standard that is capable of being "applied in practice" and "explained to a jury;" indeed, we provide a proposed jury instruction. Moreover, it is consistent with the plain meaning, legislative purpose, and context within RICO of the "pattern" requirement. Applying the proposed test, this Court should affirm the judgment below, because the Petitioners failed in their complaint to allege directly or by inference that the alleged "racketeering activity" represented a substantial portion of the relevant conduct under each of the RICO counts.

INTRODUCTION: A PROPOSED JURY INSTRUCTION ON THE "PATTERN" ELEMENT

As this Court recognized in *Sedima*, civil "RICO is evolving into something quite different from the original conception of its enactors" because private civil RICO suits are being brought "almost solely" against respected and legitimate businessmen and women rather than against the intended target of RICO—members of or-

ganized crime. 473 U.S. at 499-500. One of the principal reasons for this "evolution" is "the failure of Congress and the courts to develop a meaningful concept of 'pattern'" as set forth in 18 U.S.C. § 1961(5). *Id.* at 500. Indeed, Congress crafted the "pattern" requirement as one of the critical elements intended to focus RICO's application on organized crime figures and similar habitual criminals. Through the "pattern" requirement, Congress established a standard for determining if the course of criminal conduct at issue evinces a sample of traits, acts and other observable factors that fairly and reliably "characterize" the accused or the enterprise as corruptly involved in habitual criminal activity.

For the reasons explained below, the proper analysis of the "pattern" requirement—one that is capable of being "appl[ied] in practice" and "explain[ed] to a jury," *id.* at 494-95 n.12—is the following:

> To establish a "pattern of racketeering activity," it must be shown:
>
> (1) That at least two of the acts of racketeering activity were related—
>
> to each other in generating the proceeds for investment in the enterprise [claims under Section 1962(a)], or
>
> to each other in acquiring or maintaining an interest in, or control of, the enterprise [claims under Section 1962(b)], or
>
> to conducting the affairs of the enterprise [claims under Section 1962(c)]; and
>
> (2) That the acts of racketeering activity demonstrated a continuing course of significant criminal behavior, because—
>
> (a) the defendant engaged in at least two of the acts at substantially different times as part of distinct criminal episodes or transactions, and

(b) the acts of racketeering activity constituted a substantial portion of the activity by which—

the defendant generated the proceeds for investment in the enterprise [claims under Section 1962(a)], or

the defendant acquired or maintained an interest in, or control of, the enterprise [claims under Section 1962(b)], or

the affairs of the enterprise were conducted [claims under Section 1962(c)].

ARGUMENT

I. RICO'S "PATTERN" ELEMENT REQUIRES ALLEGATIONS AND PROOF THAT "RACKETEERING ACTIVITY" WAS TYPICAL OR CHARACTERISTIC OF THE CONDUCT OF THE ALLEGEDLY CORRUPT PERSON OR ENTERPRISE.

As this Court recognized in *Sedima*, Congress declined to define the phrase "pattern of racketeering activity." 473 U.S. at 496 n.14. When a term is "not specifically defined in the RICO statute," the Court should " 'start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used.' " *Russello*, 464 U.S. at 21 (quoting *Richards v. United States*, 369 U.S. 1, 9 (1962)). Among the factors used to test this assumption are the evolution of the term during the legislative drafting process, the legislative history of the statute, and the effect, if any, of the rule of lenity. *Id.* at 23-28.

All of these factors support the conclusion that RICO's "pattern" element requires a showing that the "racketeering activity" engaged in was sufficient to characterize the relevant activity as habitual or career criminality.

A. The Plain Meaning Of "Pattern" Is That The Sample Of Actions Is "Typical" Or "Characteristic"

The term "pattern" is generally defined as a "reliable sample of traits, acts or other observable features *characterizing an individual.*" Black's Law Dictionary 1015 (5th ed. 1979) (emphasis added); *see* Webster's Third New International Dictionary 1657 (unabridged 1971) (same). Likewise, "pattern" has been defined as "something representing a class or type . . . . *a regular, mainly unvarying way of acting or doing.*" Webster's New World Dictionary 1042 (Second College ed. 1980) (emphasis added). The Oxford English Dictionary's very first definition of "pattern" speaks of "the archetype; . . . an exemplar." Oxford English Dictionary 565 (1933). Other definitions include "anything fashioned . . . to serve as a model," "a likeness, similitude," "a part shown as a sample of the rest," an "example, an instance; *esp. a typical, model, or representative instance*, a signal example." *Id.* (emphasis added).[2]

In each of the definitions, a single theme dominates: "pattern" means actions that "characterize" or "typify" a person's conduct. Thus, as one circuit aptly concluded, the "pattern requirement was intended to limit RICO to those cases in which racketeering acts are committed in a manner characterizing the defendant as a person who regularly commits such crimes." *Lipin Enterprises Inc. v. Lee*, 803 F.2d 322, 324 (7th Cir. 1986).

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[2] The one *amicus* brief that actually turned to the dictionary in search of the plain meaning of "pattern" ignored all of these preceding meanings and then selected out of context the word "design" from the following *eighth* definition: "A decorative or artistic design, as for china, carpets, wall-papers, etc." *See* Brief for *Amici Curiae* In Support of Respondent [sic] ["State Attorneys General Brief"] at 10 & n.16 (citing to Oxford English Dictionary at 566).

B. RICO's Legislative History Also Supports Interpreting The "Pattern" Element To Require A Showing That The "Racketeering Activity" Was Typical Or Characteristic Of The Conduct Of The Allegedly Corrupt Person Or Enterprise

1. *Congress Intended to Protect Legitimate Businesses from Professional Criminals Without Attempting to Outlaw Directly Membership in Organized Criminal Associations*

Congress enacted RICO as Title IX of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922 (1970). Congress' declared purpose in passing the Act was "to seek the eradication of organized crime in the United States" through a variety of new penal provisions, investigatory tools, and remedies. *Id.* at 923. Congress' specific goal in forging the RICO title was to address the problem of infiltration of legitimate business by professional criminals. *United States v. Turkette*, 452 U.S. 576, 591 & n.13 (1981). Thus, Congress intended

> "that RICO be used against racketeers, individuals who earn their livelihood through the repetitive and continuous commission of criminal acts. The statute, properly read, is not a 'catch-all', but is instead a powerful tool to be used against racketeers and organized crime." *Gatoil (U.S.A.), Inc. v. Forest Hill State Bank*, 822 F.2d 55 (4th Cir. 1987) (unpublished opinion reported in 6 RICO L. Rptr. 316, 321).

See also International Data Bank, Ltd. v. Zepkin, 812 F.2d 149, 155 (4th Cir. 1987) ("Congress' intent [was] that RICO serve as a weapon against ongoing unlawful activities whose scope and persistence pose a special threat to social well-being").

The Organized Crime Control Act generally, and RICO specifically, were the culmination of almost two decades of intense study on how to dislodge organized crime from this nation's economic and social fabric. *See generally* Bradley, *Racketeers, Congress and the Courts: An Analysis of RICO*, 65 Iowa L. Rev. 837, 838-40 (1980). The origins of the RICO title itself can be traced to a report issued in 1967 by President Johnson's Crime Commission. *See* President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* (1967) [hereinafter "Katzenbach Report"]. The Katzenbach Report emphasized the problems presented by the infiltration of legitimate businesses by professional criminals and identified the principal methods by which that infiltration occurred:

> "Control of business concerns has usually been acquired through one of four methods: (1) investing concealed profits acquired from gambling and other illegal activities; (2) accepting business interests in payment of the owner's gambling debts; (3) foreclosing on usurious loans; and (4) using various forms of extortion." Katzenbach Report, *supra*, at 190.

These are the illicit methods that Congress ultimately decided to attack, in close paraphrase, in Section 1962(a)-(b) of RICO. *See* Lynch, *RICO: The Crime of Being a Criminal, Parts I & II*, 87 Colum. L. Rev. 661, 681-82 (1987).

Before settling on a particular legislative formulation, though, Congress considered various means of attacking the infiltration of legitimate business by career criminals. The simplest of these approaches was to outlaw membership in the Mafia and other traditional organized crime syndicates. Indeed, as early as 1965 and again in 1967, Senator McClellan—who ultimately became one of the principal sponsors of RICO—introduced legislation to outlaw membership in just such organizations. *See* S. 2187, 89th Cong., 1st Sess., 111 Cong. Rec. 14680 (1965); S. 678, 90th Cong., 1st Sess., 113 Cong. Rec. 1595 (1967). Congress rejected that approach, however, because of fears that it would create a constitutionally suspect status-based offense. *See* Report of the Ad Hoc Civil RICO Task Force of the ABA Section of Corpora-

tion, Banking and Business Law 163-65 (1985) [hereinafter "ABA Report"]; 116 Cong. Rec. 35344 (1970) (remarks of Rep. Poff); *id.* at 35343-35344 (remarks of Rep. Celler).

2. *Congress Created and Then Tightened the "Pattern" Element as Part of the Effort to Arrive at a Functional Definition of Professional or Habitual Criminal Activity*

In structuring the title that became RICO, Congress did not alter its goal of attacking the infiltration of legitimate business by career criminals. Rather, it maintained that goal but focused its attention on a different method of attack that would not be constitutionally suspect: Defining organized crime functionally by the manner in which it acts. *See* ABA Report, *supra*, at 71-72; *see generally* Lynch, *supra*, 87 Colum. L. Rev. at 687-88. As Senator McClellan came to recognize, "organized crime" is not a "precise and operative legal concept." 116 ,Cong. Rec. 18913 (1970). Instead, he understood it to be a "functional concept" that serves "simply as a shorthand method of referring to a large and varying group of criminal offenses committed in diverse circumstances." *Id.*; *see id.* at 35344 (virtually identical remarks of another principal sponsor of the RICO statute, Rep. Poff).

In 1969, Senator McClellan introduced S. 30, entitled the Organized Crime Control Act, which contained many of the organized crime recommendations of the Katzenbach Commission. When introduced, S. 30 did not have a RICO-type provision in it. During the same session, Senator Hruska introduced S. 1623, entitled the Criminal Activities Profits Act. *See* S. 1623, 91st Cong., 1st Sess., 115 Cong. Rec. 6995-6996 (1969). Senator Hruska stated that his legislation was "aimed specifically at racketeer infiltration of legitimate business." 115 Cong. Rec. 6993 (1969). This was not the first time Senator Hruska

had offered legislation aimed at the infiltration of legitimate business by organized crime. *See* S. 2049, 90th Cong., 1st Sess., 113 Cong. Rec. 18007 (1967). Like that predecessor, however, S. 1623 contained terms that swept so broadly as to include any person who invested proceeds of a *single* "criminal activity" in a legitimate business. S. 1623, *supra*.

After hearings were held on S. 30 and S. 1623 in April 1969, Senators Hruska and McClellan jointly introduced S. 1861, entitled the "Corrupt Organizations Act," which ultimately became, with some amendments, the basis of RICO. S. 1861 introduced many of the concepts now found in RICO, such as "enterprise" and "racketeering activity," and defined the three different forms of prohibited activity that appear in Section 1962(a)-(c). *See* S. 1861, 91st Cong., 1st Sess., 115 Cong. Rec. 9568-71 (1969).

Most importantly, S. 1861 introduced the concept of "pattern" to tighten the functional net more compactly on career criminals than had Senator Hruska's earlier formulations. ABA Report, *supra*, at 87-88; *see also*, Lynch, *supra*, 87 Colum. L. Rev. at 688. Rather than linking liability to the commission of a *single* "criminal act", the bill provided that specific types of crimes had to form a "pattern" before RICO's substantive provisions would apply. ABA Report, *supra*, at 88.

After holding more hearings in mid-1969, the Senate Judiciary Committee reported out S. 30, the Organized Crime Control Act, which included as Title IX a revised version of the joint McClellan-Hruska bill, S. 1861. The most notable changes from S. 1861 to Title IX of S. 30 came in response to Justice Department comments. With regard to the "pattern" element, the Justice Department had argued during the hearings that the original description of the term contained in S. 1861 was too broad. In that first formulation of the term, the bill provided that the "term 'pattern of racketeering activity' *includes at*

least one act occurring after the effective date of this chapter." S. 1861, *supra* (emphasis added). The Justice Department objected because the term "pattern" indicated that "what is intended to be proscribed is not a single, isolated act of 'racketeering activity', but *at least two such acts.*" [3] Thus, the Justice Department suggested that the Committee amend S. 1861 to provide that the term "pattern" *means* at least two acts, one of which occurred after the effective date of this chapter." [4]

The Judiciary Committee adopted the Justice Department's recommendation to require "at least two acts," but, significantly, it chose to narrow the "pattern" element even further. Instead of defining "pattern" to "*mean*" at least two acts, as the Justice Department had suggested, the Committee provided that "'pattern of racketeering activity' *requires* at least two acts of racketeering activity, one of which occurred after the effective date of this chapter." S. Rep. No. 91-617, 91st Cong., 1st Sess. at 22 (1969) (emphasis added).

The Committee's refusal to define pattern to *mean* merely two acts of "racketeering activity" reflected a considered effort to narrow RICO to hard-core habitual or professional criminal activity. The Committee explained that it understood "pattern" to include a qualitative component as well as the expressed quantitative threshold:

> "*The concept of 'pattern' is essential to the operation of the statute* • • • The infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective. *It is this factor of continuity plus relationship which combines to form a pattern.*" *Id.* at 158 (emphasis added).

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[3] Hearings on Measures Relating To Organized Crime Before the Subcommittee on Criminal Laws and Procedure of the Senate Committee on the Judiciary, 91st Cong., 1st Sess. 405 (1969) [hereinafter "Senate Hearings"] (emphasis added).

[4] *Id.* (emphasis added).

During the floor debates that followed, Senator McClellan expressly reiterated that "proof of two acts of racketeering activity, *without more*, does not establish a pattern." 116 Cong. Rec. 18940 (1970) (emphasis added); *see also* McClellan, *The Organized Crime Act (S. 30) or its Critics: Which Threatens Civil Liberties*, 46 Notre Dame L. Rev. 55, 144 (1970) ("commission of *two or more acts* of racketeering activity is made a necessary, but not a sufficient, element of a pattern under title IX") (emphasis added).[5]

Both the creation of the "pattern" requirement and the successful efforts to narrow it [6] reflected Congress'

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[5] The *amicus* brief filed by the Trial Lawyers for Public Justice erroneously suggests that Congress actually intended civil RICO to be a blunderbuss private weapon for attacking fraud in the marketplace. *See* TLPJ Brief at 12-13, 18, 22-23. It quotes from Senator Hruska's statements concerning S. 1623's private remedial provisions (TLPJ Brief at 5), but neglects to mention that the bill actually reported out of the Judiciary Committee, S. 30, contained *no* private RICO remedy. Although Senator Hruska's approach in S. 1623 was primarily to create a new civil remedy where none existed before, S. 30 relied exclusively on public enforcement through criminal, injunctive and forfeiture proceedings. The House later added a private damage provision to RICO with little or no discussion, and the Senate accepted the amendments in a similar manner. *See* ABA Report, *supra*, at 116-20.

Moreover, the Senate Judiciary Committee had added the so-called "predicate acts" of mail fraud, wire fraud and fraud in the sale of securities at the behest of the Securities and Exchange Commission at a time when RICO did not provide for *any* private damage remedy. The SEC's concern was narrowly focused on securities manipulations by organized criminal syndicates and their trading in stolen or counterfeit securities; the Commission and its Staff, to say nothing of Congress, did not contemplate that a private remedy would allow RICO to "implicate or replace the traditional private civil damages remedies under the various securities statutes," ABA Report, *supra*, at 99-100 n.130, let alone to become a general weapon for combating fraud.

[6] When S. 30 was later considered by the House of Representatives, the House tightened the threshold requirements of proving a "pattern" of criminality even further, adding a requirement that

continuing effort to create a formulation that would attack habitual or career criminals without sweeping in other criminals, much less people who are engaged primarily in lawful and respected business and professional endeavors. Indeed, when Senator McClellan and Representative Poff, another principal sponsor of RICO, responded to objections of the American Civil Liberties Union and the Association of the Bar of the City of New York that RICO's terms went far beyond proscribing organized crime's interference with legitimate business, they argued that RICO's provisions would have, at most, "an incidental reach beyond organized crime." 116 Cong. Rec. 35344 (1970); 116 Cong. Rec. 18914 (1970); *see id.* ("each title in S. 30 which is justified primarily in organized crime prosecutions has been confined to such cases to the maximum degree possible"). They based that position principally on the protection afforded by the requirement of a "pattern:"

> "Title IX's list [of racketeering activities] does all that can be expected . . . it lists offenses committed by organized crime with substantial frequency, as part of its commercial operations. *The danger that commission of such offenses by other individuals would subject them to proceedings under title IX is even smaller* than any such danger under title III of the 1968 act [listing offenses subject to court-approved wiretapping] . . . . Unless an individual not only commits such a crime *but engages in a pattern of such violations*, and uses that pattern to obtain or operate an interest in an interstate business, he is not made subject to proceedings under title IX." 116 Cong. Rec. 18940 (remarks of Sen. McClellan) (emphasis added). *See* McClellan, *supra*, 46 Notre Dame L. Rev. at 144 (same).

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the acts of racketeering must occur within ten years of each other. This third reformulation of the "pattern" concept was the one ultimately enacted into law. Blakey & Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies*, 53 Temple L.Q. 1009, 1020 (1980).

Moreover, the examples that Congress offered of the types of activity that it wished RICO to combat reaffirm that Congress intended to reach persons or organizations committed to *pervasive* criminality, and not aberrations in the activities of legitimate businesses and professionals.[7]

Thus, the legislative history of RICO generally, and the origins and evolution of the "pattern" requirement specifically, demonstrate that the Court should adhere to the ordinary meaning of "pattern" as "typical" or "characteristic" behavior. Any less stringent reading would be "irreconcilably at war with the clear congressional purpose" underlying RICO's adoption. *United States v. Campos-Serrano*, 404 U.S. 293, 298 (1971).

C. The Rule Of Lenity Also Supports The Interpretation Of "Pattern" To Require Allegations And Proof That The Criminal Behavior Was Characteristic Or Typical

Finally, the rule of lenity also supports the courts' application in RICO cases of the ordinary meaning of "pattern" as a reliably "typical" or "characteristic" sample of the conduct. *See Russello v. United States*, 464 U.S. at 29.[8] The rule of lenity counsels that terms in criminal

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[7] For example, Senator McClellan stated: "Organized criminals, too, have flooded the market with cheap reproductions of hit records and affixed counterfeit popular labels. They are heavily engaged in the illicit prescription drug industry." 116 Cong. Rec. 592 (1970). Similarly, the Senate Report noted how legitimate businesses were taken over and then looted in bust-out "scam" schemes involving bankruptcy fraud or insurance fraud. S. Rep. 91-617, *supra*, at 77. Senators Byrd and Dole spoke of how a racketeer had attempted, through arson and murder, to get A&P Tea Co. to buy mob-produced detergent that A&P had tested and rejected. 116 Cong. Rec. 607 (1970); 116 Cong. Rec. 36296 (1970).

[8] In both *Russello*, 464 U.S. at 29 and *Turkette*, 452 U.S. at 587-88 n.10, this Court recognized the applicability of the rule of lenity to RICO, but found in both cases that there was no occasion

statutes be strictly construed. The rule is "rooted in fundamental principles of due process which mandate that no individual be forced to speculate, at peril of indictment, whether his conduct is prohibited." *Dunn v. United States*, 442 U.S. 100, 112 (1979). In this case, adopting the primary and ordinary meaning of "pattern," as opposed to the more nebulous definitions suggested by other courts and other litigants, would be consistent with the concern that underlies the rule of lenity, giving at least a "fair warning" when RICO's prohibitions—which are criminal as well as civil—may apply. *Huddleston v. United States*, 415 U.S. 814, 831 (1974).

Petitioners here, among others, have argued that the Court should construe "pattern" as broadly as possible because of RICO's so-called "liberal construction clause," which states that RICO should be "liberally construed to effectuate its remedial purposes." Pub. L. 91-452, § 904(a), 84 Stat. 947. The "pattern" requirement, however, is not a remedial provision at all; it is, instead, an essential element of any RICO violation—whether civil or criminal. *See* S. Rep. 91-617, *supra*, at 81. As this Court already cautioned in *Sedima*, the liberal construction clause does not displace the rule of lenity and thus does not justify broad interpretations of the substantive provisions of RICO that apply in both civil and criminal proceedings: "The strict- and liberal-construction principles are not mutually exclusive; § 1961 and § 1962 can be strictly construed without adopting that approach to § 1964(c)." 473 U.S. at 492 n.10.

In *Sedima*, the issue was who may bring a civil suit under Section 1964(c), and thus the "liberal construc-

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to apply the rule to the statutory terms at issue because they were unambiguous. Here, by contrast, the term "pattern" does not unambiguously support broader interpretations than the one this brief offers, and therefore the rule of lenity provides further counsel against adoption of those broader and more vague interpretations.

tion" of RICO's remedial provisions applied. Here, in contrast, the issue is the meaning of the "pattern" element of criminal (and civil) liability established in Sections 1961 and 1962; thus, in this case, the operative principle is the rule of lenity's "strict construction."

II. THE CONTEXT IN WHICH THE "PATTERN" ELEMENT ARISES VARIES WITHIN RICO, AND ITS APPLICATION TO IDENTIFY CONDUCT THAT CHARACTERIZES HABITUAL CRIMINALITY MUST VARY DEPENDING ON THE RICO SUBSECTION AT ISSUE.

This Court recognized in *Sedima* that there are two critical facets in determining whether a number of acts of "racketeering activity" adequately make up a "pattern" of criminality: "continuity plus relationship." *Sedima*, 473 U.S. at 496 n.14. As this Court also noted in *Russello*, however, the meaning of a term can depend upon the context and structure of the statute in which it is used. *Russello*, 464 U.S. at 22-23; *see also Sedima*, 473 U.S. at 489; *Turkette*, 452 U.S. at 580-81. Thus, while "pattern" requires a showing of a "reliable sample" of acts that fairly "characterize" the relevant conduct as habitually criminal, the application of that requirement will vary depending on the particular subsection of Section 1962 that the prosecution or plaintiff invokes. *See* Comment, *The Pattern Element of RICO Before and After Sedima: A Look at Both Federal and Florida RICO*, 15 Fla. St. U.L. Rev. 321, 349 (1987) ("courts should consider pattern in terms of the particular section of RICO at issue. Arguably, this is precisely the meaning Congress intended when it chose not to be explicit about 'pattern'").[9]

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[9] There appears to be general agreement here that the "pattern" requirement would apply differently under the different subsections of Section 1962. *See, e.g.*, Brief of Petitioners at 33; State Attorneys General Brief at 15.

A. The "Relationship" Between The "Racketeering Activity" And RICO's Proscribed Conduct

The "relationship" aspect of the test recognizes that it is not sufficient simply to allege a laundry basket of disparate "racketeering activities" that, while occurring over time, have no relevant interconnection to RICO's proscribed conduct and so cannot be said to be a "reliable sample" of acts that fairly "characterize" the conduct as that of a professional criminal or a corrupt organization. For each RICO subsection the critical inquiry is whether the acts of racketeering are a central part of the plan to achieve what RICO outlaws—some prohibited effect on the enterprise that RICO seeks to protect from being "influenced or corrupted" by racketeers.

Under Section 1962(a), for example, the relationship aspect of the "pattern" test requires proof that the separate racketeering acts that generated the proceeds were tied together as part of a plan or scheme to invest in the enterprise. Similarly, under Section 1962(b), the "racketeering acts" must be related to each other in that the accused engaged in those acts in order to acquire or maintain control of the enterprise. Finally, under Section 1962(c), the predicate "racketeering" acts all must be related to conducting the affairs of the enterprise. *See, e.g., Torwest DBC, Inc. v. Dick*, 628 F. Supp. 163, 166 (D. Colo. 1986), *aff'd*, 810 F.2d 925 (10th Cir. 1987).[10]

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[10] The "racketeering" acts would not have to be related to each other in the sense that they are *similar*. That kind of requirement would make RICO inapplicable even to wholly criminal syndicates that engage in diverse criminal activity at different times and places in order to accomplish the goals that Section 1962 prohibits. *See, e.g., United States v. Anderson*, 626 F.2d 1358, 1367 (8th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981); *United States v. Elliott*, 571 F.2d 880, 899 n.23 (5th Cir.), *cert. denied*, 439 U.S. 953 (1978).

B. The "Continuity" Of "Racketeering Activity" In Connection With RICO's Proscribed Conduct

The "continuity" branch of the "pattern" requirement has two features. First, a "pattern" cannot consist of what is essentially a single episode or transaction. There is no reasonable basis to infer that a person is a career or habitual criminal, properly within RICO's gunsights, if he has engaged only in what is essentially a single criminal transaction, even if as a technical matter it is possible to subdivide it into individual incidents of "racketeering activity." Many courts as well as the Justice Department's RICO Guidelines recognize that reliance on "isolated" or "sporadic" criminal events would eviscerate the "pattern" requirement and would convert into a RICO criminal or treble-damage case virtually any commercial dispute that one party wants to term fraudulent.[11]

To avoid that result, the "pattern" element must be understood as requiring allegations and proof of at least two acts of "racketeering activity" at substantially different times as a part of distinct criminal episodes or transactions. Thus, for example, virtually simultaneous multiple mailings of the same document may constitute multiple instances of mail fraud, but they do not in any true sense establish that the accused has engaged in a *course* of conduct that one normally associates with a "pattern" of behavior. The same is true about communicating a series of allegedly false letters or documents as part of the same set of business relationships.[12]

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[11] *See, e.g.*, 10 Department of Justice Manual, tit. 9, ch. 110, *RICO Guidelines*, §§ 9-110.340-341 (Prentice Hall 1988); *Morgan v. Bank of Waukegan*, 804 F.2d 970, 976 (7th Cir. 1986); *Ghouth v. Conticommodity Services, Inc.*, 642 F. Supp. 1325, 1337 (N.D. Ill. 1986).

[12] *See, e.g., Tellis v. United States Fidelity & Guar. Co.*, 826 F.2d 477, 478 (7th Cir. 1987) ("multiple acts of mail fraud in furtherance of a single episode of fraud involving one victim and relating to one basic transaction cannot constitute the necessary pattern").

In addition, the "continuity" aspect of "pattern" reflects the core concept, that the acts of criminal racketeering are typical or characteristic of the conduct of the allegedly corrupt person or enterprise. That is, the continuing criminal activity must be a *substantial* rather than incidental part of the accused's relationship with the enterprise (in the case of subsections (a) and (b)) or of the conduct of the affairs of the enterprise (in subsection (c) cases). As courts have recognized in this regard:

> "[W]e do not stop at requiring a showing of multiple episodes because this alone does not adequately resolve the tension between isolated and ongoing activity. We find that RICO's purposes are best served by also requiring that, from the pleadings, a reasonable inference can be made that these episodes were not an aberration in the way a defendant conducted his business. *Rather, the pattern made up of multiple episodes must be a regular part of the way a defendant does business and in that sense, ongoing.*" [13]

This aspect of the "pattern" standard would require in a Section 1962(a) case a finding that the various acts of racketeering constituted a substantial portion of the actions by which the defendant generated the proceeds that he used to invest in the enterprise. If the proceeds had come mainly from legitimate sources, simply supplemented by the fruits of two or more illicit transactions, the investment of those proceeds could not be viewed as evincing a "pattern" of *criminal* activity. The same test would apply in determining whether the racketeering activity was substantially responsible for the accused's ability to acquire or maintain control of the enterprise in violation of Section 1962(b), and thus formed the necessary "pattern."

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[13] *Papai v. Cremosnik*, 635 F. Supp. 1402, 1412 (N.D. Ill. 1986) (emphasis added); *see Thompson v. Wyoming Alaska, Inc.*, 652 F. Supp. 1222, 1228 (D. Utah 1987).

Section 1962(c) deserves special attention, because plaintiffs have used it most often to turn ordinary civil litigation into treble-damage RICO actions. *See, e.g.*, ABA Report, *supra*, at 57 (approximately 97% of civil RICO cases brought before 1985 relied on Section 1962(c)). Congress added Section 1962(c) in response to Justice Department criticism that RICO's predecessor proposals addressed only the acts of infiltration but not their aftermath, when the professional criminal actually operated the corrupted enterprise by a pattern of criminal acts. *See* Senate Hearings at 387; Lynch, *supra*, 87 Colum. L. Rev. at 682. Indeed, the Senate Judiciary Committee expressly recognized this critical notion, stating: "when organized crime moves into a business, it usually brings to that venture all the techniques of violence and intimidation which it used in its illegal businesses." S. Rep. 91-617, *supra*, at 77; *see also* McClellan, *supra*, 46 Notre Dame L. Rev. at 141 ("Once it invades a legitimate field of endeavor, the mob quickly brings with it a full range of corrupt practices"). Thus, the "pattern" standard under Section 1962(c) requires that the plaintiff allege and prove that racketeering acts are a substantial enough part of the enterprise's affairs that it is reliable to treat the enterprise as "corrupted," and not just involved in an incidental or aberrational crime.

III. OTHER PROPOSED INTERPRETATIONS OF THE "PATTERN" ELEMENT OF RICO FAIL TO CARRY FORTH ITS MEANING AND PURPOSE.

A. The "Multiple Transactions" Test

The interpretation based on "typicality" and evidence of habitual criminal behavior better implements the "pattern" element than the simple "multiple transactions" test that several circuits have embraced. *See, e.g., Sun. Sav. & Loan Ass'n v. Dierdorff*, 825 F.2d 187, 193 & n.4 (9th Cir. 1987); *Elliott v. Chicago Motor Club, Ins.*, 809 F.2d 347, 349-50 (7th Cir. 1986). That test and other sim-

ilar formulations, *see, e.g., Barticheck v. Fidelity Union Bank/First Nat'l State*, 832 F.2d 36, 38-39 (3d Cir. 1987); *Roeder v. Alpha Indus., Inc.*, 814 F.2d 22, 31 (1st Cir. 1987), add little as a practical matter beyond the threshold requirement of two acts of "racketeering" within ten years. In the modern economic world, almost any commercial relationship will involve a sufficient number of participants and will extend over a sufficiently long period of time that a competent attorney will be able to plead multiple "transactions" easily in almost any commercial civil litigation in which the plaintiff is willing to allege "fraud." *See, e.g., Exeter Towers Assoc. v. Bowditch*, 604 F. Supp. 1547, 1554-55 (D. Mass. 1985).

For instance, in the standard securities class-action in which the accounting firm is one of the "deep pocket" defendants, the plaintiffs typically allege that the company's financial statements, which are mailed to thousands of investors and usually reappear in several different audited statements, contain some "fraudulent" misstatement or non-disclosure, and that the accountants "knew of" or "recklessly disregarded" the alleged fraud when rendering the audit report. Under any of the formulations offered by the petitioners, the *amici* who support them, or the courts that have interpreted "pattern" to require only multiple "episodes" or "transactions," these ordinary securities law suits would probably remain RICO suits, even though it is obvious that in the typical case any misconduct would not fairly characterize the accounting firm, its audit partner, or its client as a habitual criminal or a basically corrupt organization.[14]

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[14] As evidence that "fraudulent financial reporting" is a "serious national problem," the Trial Lawyers for Public Justice cite the fact that "major accounting firms" have paid more than $180 million to settle liability suits since 1980. TLPJ Brief at 21. Apart from the fact that this assertion has nothing to do with whether Congress intended to have RICO reach false financial reports by publicly-held companies or their professionally licensed auditors, this Court already has recognized that defendants settle RICO suits for many reasons, and that the threat of treble-damages often makes the risks of defending oneself in a RICO case intolerable. As Justice Marshall wrote in *Sedima*: "Many a prudent defendant, facing ruinous exposure, will decide to settle even a case with no merit. It is thus not surprising that civil RICO has been used for extortive purposes, giving rise to the very evils that it was designed to combat." *Sedima*, 473 U.S. at 506 (Marshall, J., with Brennan, Blackmun and Powell, J.J., dissenting); *see also Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 739 (1975).

B. The Interpretation Proposed By The Solicitor General

The Solicitor General as *amicus curiae* asserts that all "pattern" requires is "some common element or theme" between the racketeering acts, and urges this Court to adopt as the meaning of "pattern" in RICO the definition of the term "pattern of criminal conduct" found in 18 U.S.C. § 3575(e), which is part of Title X of the Organized Crime Control Act. Brief for the United States as *Amicus Curiae* Supporting Petitioners ["U.S. Brief"] at 9, 13-14; *see also* TPLJ Brief at 3. The Solicitor General asserts that the "use of the same term in a companion provision of the same statute strongly suggests that Congress intended the term to have the same meaning when used in RICO." U.S. Brief at 9. However, as the Solicitor General himself argued in another RICO case, *Russello*, and as this Court itself there recognized, the applicable rule of statutory interpretation is different:

> "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion and exclusion." 464 U.S. at 23 (citations omitted).[15]

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[15] In *Russello*, the defendant had urged the Court to interpret the term "interest" to have identical meanings in 18 U.S.C. § 1963(a)(1) and § 1963(a)(2). In response, however, the Solicitor General invoked the same precedent as the Court ultimately relied on in deciding the issue against the defendant. *See* Respondent's Brief at 21-22 & n.6, *Russello v. United States*, 464 U.S. 16 (1983).

Here, Congress used the term "pattern" differently in the two titles. In Title X, Congress defined the elements of a "pattern of criminal conduct" that satisfies various criteria, 18 U.S.C. § 3575(e), while the RICO title simply states what a "pattern of racketeering" minimally "requires," 18 U.S.C. § 1961(5), without further elaboration.

The different purposes that Title X and RICO serve also reinforce the propriety of recognizing that the "pattern" element was not intended to be the same in the two titles. Title X is a sentence-enhancing statute, and covers a wider range of criminal activities than RICO. A court can impose an enhanced sentence under Title X whenever any person commits *any* single felony as a part of a "pattern of criminal conduct" that constitutes a "substantial source" of his income or involves a conspiracy with three or more persons. 18 U.S.C. § 3575 (e)(2) and (3). RICO, by contrast, has a far narrower focus, both in terms of the criminal activities covered, 18 U.S.C. § 1961(1), and the additional functional requirements set forth in Section 1962. The RICO elements focus the statute on organized crime's impact on legitimate interstate business, and, in turn, expose that narrower category of professional criminal to far harsher penalties for conduct falling within its narrow bounds, including an additional 20-year prison term, forfeiture, divestiture, and private treble-damage liability. *See* 18 U.S.C. §§ 1963, 1964(a), (b), and (c). Thus, the definition of "pattern" in Title X does not properly carry over in RICO.

In urging the Court to import Title X's definition of "pattern" into RICO, the Solicitor General is forced to argue that the Court must ignore Congress' repeated references to "continuity" as an essential ingredient of a RICO violation. U.S. Brief at 8, 13. Yet, this Court already recognized in *Sedima* that "continuity" is an essential component of what Congress meant when it

spoke of a "pattern" of racketeering in RICO. The Solicitor General's approach, moreover, would make RICO far more sweeping than Congress intended, since it would mean that commission of any two predicates as part of the same "common scheme, plan or motive," *id.* at 18, without more, would constitute a "pattern" of racketeering.[16]

The Solicitor General himself recognizes that Congress did not intend that RICO be used in every instance in which two merely "related" predicate acts occur, and thus he later asserts that two racketeering acts that might be "related" to a single plan could fail to meet the "pattern" requirement because they would "still be 'isolated' acts" that lack "continuity" and thus, do not "reflect[] a risk of continuing harm to society." *Id.* at 14. In this manner, the Solicitor General concedes that "something more" than mere "relationship" is needed to meet the requirements for a RICO case.

While the Solicitor General appears to concede that the "something more" is required to satisfy the "pattern" requirement, he relies on RICO's other elements, specifically the requirement of an "enterprise," *id.* at 12, as a device for providing the "something more." He uses the rest of his brief to reiterate that, when the predicate acts "benefit a criminal enterprise," then the necessary "threat of continuity and hence the required pattern" is present. *Id.* at 18. Although the Solicitor General keeps saying that the "criminal enterprise" is but an "example" of the circumstances in which the "pattern" requirement is fulfilled through another element of a RICO case, he never offers any other examples.

The major flaw in the Solicitor General's vague formulation, which is hardly "articulable" to a trial jury,

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[16] It is true that the "pattern" element in Title X focuses *only* on whether the criminal acts are "interrelated." 18 U.S.C. § 3575(e). Thus, this more limited focus offers further reason why Title X cannot serve as a guide to interpreting RICO.

see Sedima, 473 U.S. at 494 n.12, is that his focus on the relationship between the predicate acts and a "criminal enterprise" would work only in a subclass of RICO cases. It does not have any evident bearing on RICO cases under subsection (a), which deals with investing pattern-derived proceeds in a presumably lawful enterprise, or subsection (b), which deals with acquiring or maintaining control of an enterprise, which may be legitimate or criminal, through a "pattern" of racketeering. Nor is it clear whether or how it would apply to any cases under subsection (c) involving otherwise legitimate enterprises, such as the parties here, Northwestern Bell and the Minnesota Public Utilities Commission.[17]

By contrast, the tests for the "continuity" and "relationship" aspects of the "pattern" element that we have outlined would give full effect to the statutory language and legislative purpose while applying to all types of RICO cases. In addition, measured against prosecutions that the government has already brought under the various subsections of Section 1962, the "pattern" test that we propose would fully protect the government's power to pursue habitual, organized criminality.

Under Section 1962(a), for example, the government may show, as it has done on past occasions, that the money the accused invested in the enterprise was substantially derived from racketeering activity and not from legal sources. *See, e.g., United States v. Cauble*, 706 F.2d 1322, 1334-43 (5th Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984) (majority of money invested in enterprise derived from drug-smuggling activities). Under Section 1962(b), the government may demonstrate, as it has readily done before, that the accused

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[17] The Solicitor General explicitly (and properly) rejects any suggestion that mere connection with "a legitimate enterprise" automatically would provide the "something more" needed to meet the "pattern" requirement. U.S. Brief at 19 n.10.

acquired or maintained an interest in the enterprise substantially through racketeering activity, and not primarily by legal means. *See, e.g., United States v. Local 560*, 780 F.2d 267, 271 (3d Cir. 1985), *cert. denied*, 476 U.S. 1140 (1986) (wide-spread acts of murder and extortion constituted substantial portion of activities by which defendants acquired interest in and control of local union); *United States v. Gambino*, 566 F.2d 414, 416-17 (2d Cir. 1977), *cert. denied*, 435 U.S. 952 (1978) (defendants acquired and maintained control of private sanitation industry in Bronx substantially through extortion, threatening to kill competitors, and administering beatings).

Similarly, under Section 1962(c), the government may continue to prosecute members of wholly criminal organizations because, by definition, those entities are corrupt organizations whose very existence demonstrates that their affairs are substantially conducted through means of criminal activities. *See, e.g., United States v. Turkette*, 452 U.S. at 579; *United States v. Elliott*, 571 F.2d 880 (5th Cir.), *cert. denied*, 439 U.S. 953 (1978). The government may also use RICO to prosecute members of otherwise legitimate enterprises under Section 1962(c), when it can demonstrate that they conducted a substantial portion of its affairs through criminal means, thus demonstrating that, in the words of the title of the statute, the enterprise has become in substance a "corrupt organization." *See, e.g., United States v. Local 560*, 780 F.2d at 272 (union's affairs permeated by and conducted substantially through criminal means of murder and extortion); *United States v. Navarro-Ordas*, 770 F.2d 959 (11th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986) (banks' affairs conducted substantially through illegal activities of mail and wire fraud, leading to banks' collapse).

IV. UNDER THE PROPER INTERPRETATION OF "PATTERN," THE JUDGMENT BELOW IS CORRECT.

In three counts of their complaint, petitioners ("plaintiffs") alleged that the defendants had violated RICO because of nine instances of alleged bribery over a five-year period. *See* J.A. I. Under the proper understanding of the "pattern" element, plaintiffs' complaint was inadequate because they failed to allege in it directly or by inference that the alleged "racketeering activity" was a substantial portion of the relevant conduct under each of the counts.

As to the count under Section 1962(a) (Count II), there is no allegation that a substantial portion of the money that Northwestern Bell invested in itself during the five-year period at issue was generated by the allegedly criminal acts. To the extent that it is plausible to credit allegations that acts of alleged bribery enabled Northwestern Bell to acquire or maintain an "interest in or control of" the Minnesota Public Utilities Commission within the meaning of Section 1962(b), there is no allegation that Northwestern Bell's ability to influence the Commission's regulatory decisions resulted primarily or substantially from the alleged "racketeering activity" rather than from ordinary filings and argument, and thus Count III must fail. Finally, the claim in Count IV under Section 1962(c) is deficient because there is no allegation or basis for inferring that the illegal activity alleged against Northwestern Bell characterized or typified the conduct of the Minnesota Public Utilities Commission because it represented a substantial portion of the way that enterprise conducted its activities under Northwestern Bell's influence.[18]

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[18] Plaintiffs also alleged that defendants conspired to violate RICO. J.A. I at 81; *see* 18 U.S.C. § 1962(d). Since the underlying RICO claims are not adequately pleaded, the conspiracy count also fails. *See, e.g., Torwest DBC, Inc. v. Dick*, 810 F.2d 925, 927 n.2 (10th Cir. 1987).

In sum, the plaintiffs have not alleged all of the elements necessary to demonstrate the requisite "pattern" of pervasive criminality. Therefore, the district court properly dismissed the RICO claims, and the court of appeals properly affirmed.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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OCTOBER TERM, 1988

H.J. INC., ET AL., PETITIONERS

v.

NORTHWESTERN BELL TELEPHONE COMPANY, ET AL., RESPONDENTS

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR THE NATIONAL ASSOCIATION OF MANUFACTURERS AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-1252

H.J. INC., ET AL., PETITIONERS

v.

NORTHWESTERN BELL TELEPHONE COMPANY, ET AL.,
RESPONDENTS

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF FOR THE NATIONAL ASSOCIATION OF MANUFACTURERS AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

INTEREST OF THE AMICUS CURIAE

The National Association of Manufacturers of the United States ("NAM") is a voluntary business association of more than 13,000 companies. NAM's member companies employ 85% of all manufacturing workers in the United States and produce over 80% of the nation's manufactured goods.

NAM's members have been named as defendants in a number of private civil suits under the Racketeer Influenced and Corrupt Organizations Act ("RICO"). Civil RICO suits against legitimate business entities constitute a principal abuse of the statute, as this Court recognized in *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479 (1985). The "pattern" element is fundamental to the statutory scheme and, as noted in *Sedima*, is of central importance in correcting abuses of RICO by limiting the civil cause

of action to cases of true racketeering as Congress intended. NAM submits this brief as *amicus curiae* to address the definition of "pattern" and to apprise the Court of the serious abuses of civil RICO that the business community has faced because of the overbroad reading of the pattern element by many lower courts.

INTRODUCTION AND SUMMARY OF ARGUMENT

At issue in this case is the definition of the term "pattern" in Section 1961(5) of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961 *et seq.* In *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 496 n.14 (1985), this Court recognized that the Act does not define "pattern."

Since RICO does not provide a definition, it is the proper role of the judiciary to give meaning to the term "pattern" by construing it in accordance with the language, history, and purposes of the statute. Indeed, *Sedima* charged "the courts to develop a meaningful concept of 'pattern'" in order to correct "[t]he 'extraordinary' uses to which civil RICO has been put" (473 U.S. at 500). Therefore, unlike the situation in *Sedima*—where the Court believed that the proposed requirements of a prior conviction and racketeering injury had "no support in the statute's history, its language, or considerations of policy" (*id.* at 493)—the question presented in this case requires the Court only to engage in the customary judicial function of construing a statutory term that Congress used but did not define.

As the Court acknowledged in *Sedima*, civil RICO has "evolv[ed] into something quite different from the original conception of its enactors" (473 U.S. at 500). The misuse of civil RICO in suits brought against legitimate business entities exacts a heavy price "by saddling legitimate businesses with uncalled-for punitive bills and undeserved labels" (*id.* at 520 (Marshall, J., dissenting)). Overbroad application of the private treble-damages provision has led to results that Congress could not have intended: distortion of other federal remedies that Congress and the courts have carefully formulated; extension of federal jurisdiction to encompass routine commercial disputes that are properly the domain of state law and state courts; inundation of the federal courts with complex and protracted RICO cases; and coercive pressure on defendants, confronted with the threat of treble damages and the stigma of the label "racketeer," to settle even meritless claims. For these reasons, abuse of civil RICO presents a problem of great concern both to the bench and bar and to the general public.

Under a proper interpretation of RICO, predicate acts of racketeering, to constitute a pattern, must be typical of the way in which the defendant conducts his activities. This definition accords with the plain meaning of the word "pattern" as a regular course of conduct that is characteristic of the defendant's behavior. In addition, it is consistent with the legislative history of RICO and the congressional purpose to level this racketeering statute against professional or career criminals who are engaged in habitual criminality; it was not Congress's intent that RICO broadly encompass every person, including legitimate businesses, alleged to have committed two of the vast array of offenses enumerated in the statute. Finally, this interpretation offers a meaningful and practical solution to the misuse of civil RICO without excluding those situations that were Congress's focus in enacting the statute or interfering with the kinds of criminal prosecutions that the government in fact has brought.

Sedima correctly pointed out that the prevalent misuse of civil RICO is "primarily the result" of the absence of a meaningful definition of "pattern" (473 U.S. at 500). This case affords the Court a critical opportunity to curb widespread abuse of the statute by confining the cause of action to those defendants for whom the draconian provisions of RICO were intended: habitual or career criminals.

ARGUMENT

BECAUSE RICO IS DIRECTED AGAINST CAREER CRIMINALS, THE PATTERN ELEMENT REQUIRES THAT THE PREDICATE ACTS OF RACKETEERING BE TYPICAL AND CHARACTERISTIC OF THE WAY IN WHICH THE DEFENDANT CONDUCTS HIS ACTIVITIES

A. A Pattern Of Racketeering Activity Requires "Relationship" And "Continuity"

The concept of "pattern" is central to RICO. See *Agency Holding Corp.* v. *Malley-Duff & Assoc.*, 107 S. Ct. 2759, 2766 (1987) (emphasis in original) ("the heart of any RICO complaint is the allegation of a *pattern* of racketeering"). In *Sedima*, the Court, quoting from the legislative history of RICO, stated that it is the " 'factor of *continuity plus relationship* which combines to produce a pattern' " (473 U.S. at 496 n.14, quoting S. Rep. No. 617, 91st Cong., 1st Sess. 158 (1969) (emphasis added by the Court)).

Following *Sedima*, the lower courts have reached general agreement on the meaning of "relationship." Predicate acts of racketeering activity meet this requirement if two or more of them are related to each other by means of either their common characteristics or their connection to a common scheme or objective. See, *e.g.*, *Morgan* v. *Bank of Waukegan*, 804 F.2d 970, 975 (7th Cir. 1986); *Torwest DBC, Inc.* v. *Dick*, 810 F.2d 925, 928 (10th Cir. 1987). This test is in accord with the commonly understood meaning of "relatedness." See, *e.g.*, Webster's New World Dictionary 1198 (2d college ed. 1980).

The concept of "continuity" has proven to be more elusive. In our view, the various standards of "continuity" devised by the lower courts represent different attempts to grapple with the same question: when is a defendant's course of criminal conduct sufficiently ongoing and persistent to pose the special threat to society that Congress intended to combat through the severe sanctions of RICO? See, *e.g.*, *Flip Mortg. Corp.* v. *McElhone*, 841

F.2d 531, 538 (4th Cir. 1988) (" 'the heightened civil and criminal penalties of RICO are reserved for schemes whose scope and persistence set them above the routine' • • • [because they involve an] extended, widespread, or particularly dangerous pattern of racketeering").

The Eighth Circuit's "multiple schemes" standard is one salutary effort to return civil RICO to its congressionally intended scope. By requiring that the defendant must have engaged in multiple criminal schemes, the Eighth Circuit eliminates most routine commercial disputes from the reach of the statute, thereby curbing the primary abuse of civil RICO. See 116 Cong. Rec. 35193 (1970) (remarks of Rep. Poff) (emphasis added) (a pattern of racketeering activity requires "at least two *independent* offenses").

There is, however, a more refined standard that is securely grounded in the language and history of RICO and that, we believe, better serves to restrict the statute to its intended sphere. This approach recognizes that the concepts of "pattern" and "continuity" are composed of two elements: recurrence and typicality. Under this test, predicate acts of racketeering have the necessary continuity to form a pattern where (i) at least two of the acts occurred at substantially different times as part of separate criminal episodes or transactions, and (ii) the acts are typical and characteristic of the defendant's conduct.

B. The Pattern Standard Requires That The Racketeering Activity Must Have Occurred At Substantially Different Times As Part Of Separate Criminal Episodes Or Transactions

As indicated by the common meaning of "pattern" and "continuity," RICO is properly read to require that the defendant must have engaged in repeated and ongoing criminality, not merely in one criminal incident that technically constitutes two offenses. Thus, to constitute a pattern, at least two of the acts of racketeering must have occurred at substantially different times as part of separate criminal episodes or transactions.

The courts of appeals have generally recognized that a single criminal episode or objective, even though carried out through a number of illegal acts, fails the pattern requirement as a matter of law. See, *e.g.*, *Roeder* v. *Alpha Industries, Inc.*, 814 F.2d 22 (1st Cir. 1987); *Eastern Pub. & Adv.* v. *Chesapeake Pub. & Adv.*, 831 F.2d 488 (4th Cir. 1987); *Medical Emer. Serv. Assoc.* v. *Foulke*, 844 F.2d 391 (7th Cir. 1988); *Garbade* v. *Great Divide Min. & Mill. Corp.*, 831 F.2d 212 (10th Cir. 1987). Accordingly, the racketeering acts, "[i]n order to be sufficiently continuous to constitute a pattern of racketeering activity, * * * must be ongoing over an identified period of time so that they can fairly be viewed as constituting separate transactions." *Morgan* v. *Bank of Waukegan*, 804 F.2d at 975.

This element of the pattern standard serves the important purpose of excluding essentially one-shot offenses, "limited in occurrence, in scope, and in purpose, that have been the traditional subjects of state tort law [and] were not intended to be swept into RICO's reach by Congress" (*Eastern Pub. & Adv.*, 831 F.2d at 492).[1] For example, the distribution of a fraudulent prospectus in separate mailings to different investors does not constitute a pattern of racketeering activity. See *International Data Bank, Ltd.* v. *Zepkin*, 812 F.2d 149 (4th Cir. 1987). Likewise, a series of letters or telephone calls in the course of a single fraudulent endeavor is not a pattern. See *Condict* v. *Condict*, 826 F.2d 923, 927-929 (10th Cir. 1987). And the payment of a bribe, even if made in separate installments that amount to multiple offenses under the criminal code, does not establish a pattern. See *Roeder*, 814 F.2d at 30-31.

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[1] Nearly 30% of the civil RICO cases decided in 1986 involved allegations of racketeering activity limited to a single episode. See Blakey & Cessar, *Equitable Relief Under Civil RICO: Reflections on* Religious Technology Center v. Wollersheim: *Will Civil RICO Be Effective Only Against White-Collar Crime?*, 62 Notre Dame L. Rev. 526, 619 (1987).

In applying this standard, the courts have "realize[d] that skilled attorneys may artfully plead their civil RICO case" to contrive separate criminal episodes or transactions "so as to prevail over a defendant's motion to dismiss." *Jones* v. *Lampe*, 845 F.2d 755, 757 (7th Cir. 1988). This is especially true for racketeering acts involving fraud, since "'any "scheme" to defraud can be broken down into its component acts'" (*id.* at 758). Thus, "'the existence of a multiplicity of predicate acts * * * [of fraud] may be no indication of the requisite continuity of the underlying fraudulent activity.'" *Elliott* v. *Chicago Motor Club Ins.*, 809 F.2d 347, 350 (7th Cir. 1987). See also, *e.g.*, *Walk* v. *Baltimore & Ohio R.R.*, No. 87-3585 (4th Cir. May 31, 1988), slip op. 13-14 ("[v]irtually every action taken by * * * a corporation is subject to challenge as either mail or securities fraud"); *Flip Mortg. Corp.*, 841 F.2d at 538 ("a great many ordinary business disputes * * * could be described as multiple individual instances of fraud"); *International Data Bank*, 812 F.2d at 154-155 ("[i]t will be the unusual fraud that does not enlist the mails and wires in its service at least twice"); *Morgan* v. *Bank of Waukegan*, 804 F.2d at 976 ("[t]he existence of multiple predicate acts * * * [of fraud] is only because the acquisition of stock in this context is a complicated transaction that requires many separate statements from a variety of persons").

To avoid this problem of artful pleading and artificially constructed episodes, it is the responsibility "of the district court to carefully scrutinize the allegations contained in the complaint to determine whether they state a claim" (*Jones* v. *Lampe*, 845 F.2d at 757). Although the court ordinarily accepts the plaintiff's factual allegations as true, "it need not close its eyes to the content of these allegations," and "conclusory allegations" and "label[s]" concerning multiple schemes are not controlling (*id.* at 757, 758). Instead, the plaintiff's "characterization of events must be consistent with the facts alleged in the complaint" (*id.* at 758). See also, *e.g.*, *Manax* v. *McNamara*, 842 F.2d 808, 811 (5th Cir. 1988)

("plaintiffs in RICO claims 'must plead specific facts, not mere conclusory allegations' ").

In sum, the requirement of separate criminal episodes or transactions, rigorously applied to screen out inappropriate RICO claims, represents an important element of the pattern definition. But while that requirement is a necessary part of the concept of "pattern," it is not a sufficient and complete standard by itself. Rather, the proper definition of "pattern" must contain an additional element: typicality.

C. The Pattern Standard Requires That The Racketeering Acts Be Typical And Characteristic Of The Defendant's Activities

In addition to separate criminal episodes or transactions, the pattern element requires that the alleged racketeering activity must constitute a typical and characteristic course of the defendant's conduct. This requirement is supported by the plain language of RICO and the commonly understood meaning of "pattern," as well as by the legislative history and purposes of the statute. Under this interpretation, the predicate acts of racketeering constitute a pattern only if they are typical and characteristic of the way in which the defendant conducts his activities.

1. *The Plain Meaning Of "Pattern" Requires Typical And Characteristic Conduct*

Where a term "is not specifically defined in the RICO statute," the Court must assume " 'that the legislative purpose is expressed by the ordinary meaning of the words used.' " *Russello* v. *United States*, 464 U.S. 16, 21 (1983). See also *Organized Crime Control: Hearings on S. 30, and Related Proposals, Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 91st Cong., 2d Sess. 665 (1970) ("*1970 House Hearings*") (statement of Ronald L. Gainer, United States Department of Justice) (the bill "says 'pattern,' and pattern has to be construed with its normal meaning"). The ordinary meaning of

"pattern" unmistakably denotes the idea of typical and characteristic conduct.

This central feature of "pattern" has been expressed in a number of ways. For example, "pattern" is defined as "a representative instance" or "a typical example." Webster's Third New International Dictionary 1657 (unabridged 1971). See also, *e.g.*, VII Oxford English Dictionary 565 (1970) ("a typical, model, or representative instance"). Similarly, "pattern" means "a reliable sample of traits, acts, or other observable features characterizing an individual." Webster's Third New International Dictionary 1657 (unabridged 1971); Black's Law Dictionary 1015 (5th ed. 1979). "Pattern" also refers to "a regular, mainly unvarying way of acting or doing." Webster's New World Dictionary 1042 (2d college ed. 1980). And more generally, "pattern" is a "habit," "custom," "practice," or "characteristic." Roget's International Thesaurus ¶ 642.4 at 494 (4th ed. 1977).

These definitions of "pattern" all point to the same conclusion: predicate acts of racketeering, to constitute a pattern, must represent a "typical" and "characteristic" form of the defendant's behavior.

2. *The Legislative History Demonstrates That RICO Is Directed Against Habitual Criminal Conduct By Professional Criminals*

This interpretation of "pattern," requiring a typical and characteristic course of conduct, is reinforced by the legislative history and purposes of RICO. In enacting the special (and especially severe) provisions of RICO, Congress aimed the statute at organized and habitual criminal conduct committed by professional or career criminals for whom crime is a way of life. Properly understood, RICO was not intended to sweep in legitimate businessmen who may be alleged to have committed two predicate offenses in the course of their otherwise legitimate activities.

The lengthy history of RICO is already familiar to this Court. See, *e.g.*, *Sedima*, 473 U.S. at 486-488; *id.* at 510-

519 (Marshall, J., dissenting). As the Court explained in *Russello*, the focus of RICO was organized crime. "The legislative history clearly demonstrates that the RICO statute was intended to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots. * * * The * * * goal was to remove the profit from organized crime by separating the racketeer from his dishonest gains" (464 U.S. at 26, 28). RICO was not intended to supersede the arsenal of criminal and civil remedies provided under state and federal law for ordinary instances of unlawful activity; rather, it was directed against the special problem that had proven insoluble under existing laws and thus gave rise to the need for this new statute: the eradication of organized crime.

In early versions of the bills leading to RICO, Congress sought expressly to define and prohibit "organized crime." For example, in 1967, Senator McClellan, a principal sponsor of RICO, introduced a bill to "outlaw the Mafia and other organized crime syndicates." The bill made it a crime to be a member of "the Mafia" or "any other organization" having as one of its purposes the violation of the criminal laws "relating to gambling, extortion, blackmail, narcotics, prostitution, or labor-racketeering." S. 678, 90th Cong., 1st Sess. (1967).

Although this approach corresponded exactly with Congress's intent to attack organized crime, Congress became concerned that such a statutory offense might be an unconstitutional status crime. See, *e.g.*, 116 Cong. Rec. 35344 (1970) (remarks of Rep. Poff); *id.* at 35343 (remarks of Rep. Celler). Accordingly, Congress abandoned that approach in favor of the formulation, based on the concept of "a pattern of racketeering activity," that ultimately was embodied in RICO.

In redrafting RICO in this manner to allay constitutional concerns, Congress never shifted its focus from organized crime as the target of the statute. The purpose of RICO (and the other provisions of the Organized Crime Control Act of 1970) is clearly indicated in the

congressional statement of findings and purpose: "It is the purpose of this Act to seek the eradication of organized crime in the United States * * * by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime." See *Russello*, 464 U.S. at 27. The legislative history of RICO is replete with similar statements, which manifest Congress's understanding that the statute was directed against organized crime. See, *e.g.*, S. Rep. No. 617 at 76; 116 Cong. Rec. at 18939, 18940 (remarks of Sen. McClellan); *id.* at 35196 (remarks of Rep. Celler); *id.* at 35200 (remarks of Rep. St Germain); *id.* at 35344 (remarks of Rep. Poff); *id.* at 35347 (remarks of Rep. Steiger).

At no point in the legislative process did Congress indicate an intention drastically to expand the original scope of RICO to encompass legitimate businessmen and ordinary commercial disputes. In particular, the civil RICO provisions received very little attention in Congress, and the debates nowhere suggest that RICO would routinely be applicable to legitimate corporations and corporate officials having no connection with organized crime; on the contrary, the sponsor of the civil RICO section explained that the provision would afford a remedy to "the victims of organized crime" (116 Cong. Rec. at 35346 (remarks of Rep. Steiger)) and "those who have been wronged by organized crime" (*1970 House Hearings*, *supra*, at 520 (statement of Rep. Steiger)). See also 116 Cong. Rec. at 35228 (remarks of Rep. Steiger) (civil RICO provides "a powerful weapon against organized crime"); *id.* at 35295 (remarks of Rep. Poff) (civil RICO is a remedy "for use against organized criminality").[2] Moreover, the addition of wire fraud, mail fraud,

[2] In enacting civil RICO, Congress appreciated the problems posed by private parties suing organized crime figures for money damages. Representative Steiger noted "the very difficult position in which a citizen who sues under [civil RICO] will place himself. He may be one individual suing an arm of La Cosa Nostra, and the subject of his lawsuit may be its corrupt involvement in a major industry. He will need * * * courage * * * [to be a plaintiff]" (116

and securities fraud as predicate acts of racketeering—which is largely responsible for the widespread abuse of civil RICO today—was made at the behest of the Securities and Exchange Commission simply to ensure that RICO covered all of the types of offenses that organized crime commonly commits, and in fact that amendment occurred at a time when the statute did not contain a private civil remedy at all. See Report of the Ad Hoc Civil RICO Task Force of the ABA Section of Corporation, Banking and Business Law 98-100 & n.130 (1985).

Of course, Congress's revision of the statutory scheme did have the indirect consequence of broadening the reach of RICO beyond the Mafia. But that extension did not signify a radical shift in the thrust of the statute, and it does not suggest that Congress meant to subject legitimate corporations and businessmen to the severe sanctions and stigma of RICO. Thus, as summarized by Senator McClellan, the RICO statute that Congress adopted, like the other titles in the Organized Crime Control Act, "is justified primarily in organized crime prosecutions" and "has been confined to such cases to the maximum degree possible" (116 Cong. Rec. at 18914). Congress well understood that RICO's "provisions [are] primarily intended to affect organized crime" and any "reach beyond organized crime" would be at most "incidental." *Ibid.* (remarks of Sen. McClellan); see also *id.* at 35344 (remarks of Rep. Poff).

The pattern requirement is of critical importance in preventing the expansion of RICO beyond this intended sphere. See S. Rep. No. 617 at 158 ("[t]he concept of 'pattern' is essential to the operation of the statute"). In particular, Senator McClellan recognized the "danger" that the "commission of [predicate] offenses by other individuals" than organized crime figures "would subject

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Cong. Rec. at 35227). Even though Representative Steiger recognized that many potential plaintiffs would not "wish to take advantage of such a remedy" (*1970 House Hearings, supra*, at 520), he intended that civil RICO afford them the "option" (116 Cong. Rec. at 35347).

them to proceedings under" RICO. As he noted, "[i]t is impossible to draw an effective statute which reaches most of the commercial activities of organized crime, yet does not include offenses commonly committed by persons outside organized crime as well." Senator McClellan concluded that the danger of such misuse was "small[]," however, because of the pattern element: "[u]nless an individual not only commits such a crime but engages in a pattern of such violations, * * * he is not made subject to proceedings under [RICO]." 116 Cong. Rec. at 18940. Thus, it is the concept of "pattern" that Congress understood would limit RICO to career criminals and guard against the "danger" that the statute would be invoked against others who commit predicate offenses.[3]

Consistent with this legislative history, Justice Powell, in a passage in his dissent in *Sedima* that the majority did not dispute, correctly summarized the RICO scheme:

> "The 'pattern' element of the statute was designed to limit its application to planned, ongoing, continuing crime * * *. [Congress intended] to keep the reach of RICO focused directly on traditional organized

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[3] The dissent to the House Report, which was briefly discussed in *Sedima* (473 U.S. at 487, 498), does not indicate that civil RICO was intended to be applied to legitimate businesses. These opponents of the bill recognized that the target of RICO was organized crime, but they expressed concern that, through "poor draftsmanship," the statute might be invoked to "harass" businessmen who commit two predicate offenses. H.R. Rep. No. 1549, 91st Cong., 2d Sess. 185, 187 (1970) (dissenting views). The opponents did *not* state that these private damages suits would be permissible under RICO, but only that "disgruntled and malicious" plaintiffs might attempt to file such actions to destroy "innocent businessmen" through "adverse publicity" and "protracted, expensive" litigation (*id.* at 187). More important, the dissenting Report was based on the clearly incorrect understanding that any two predicate offenses are sufficient to constitute a pattern. Especially because this mistaken interpretation was contradicted by other portions of the legislative history, the views of RICO's opponents do not provide a reliable indicator of the meaning of the statute. See, *e.g.*, *National Woodwork Manufacturers* v. *NLRB*, 386 U.S. 612, 639-640 (1967); *NLRB* v. *Fruit & Vegetable Packers*, 377 U.S. 58, 66 (1964).

> crime and comparable ongoing criminal activities carried out in a structured, organized environment. The reach of the statute beyond traditional mobster and racketeer activity and comparable ongoing structured criminal enterprises, was intended to be incidental, and only to the extent necessary to maintain the constitutionality of a statute aimed primarily at organized crime."

473 U.S. at 526, quoting ABA Report at 71-72. Lower courts and commentators have likewise recognized that the pattern element was intended to limit RICO to members of organized crime and other professional criminals for whom repeated criminality represents a typical and characteristic course of conduct. See, *e.g.*, *Lipin Enterprises Inc.* v. *Lee*, 803 F.2d 322, 324 (7th Cir. 1986) ("[t]he pattern requirement was intended to limit RICO to those cases in which racketeering acts are committed in a manner characterizing the defendant as a person who regularly commits such crimes"); *International Data Bank*, 812 F.2d at 155 (quoting *Lipin Enterprises*); *Papai* v. *Cremosnik*, 635 F. Supp. 1402, 1412 (N.D. Ill. 1986) ("RICO's purposes are best served by * * * requiring that * * * the pattern made up of multiple episodes must be a regular part of the way a defendant does business"); Howard, *Moving to Dismiss a Civil RICO Action*, 35 Clev. St. L. Rev. 423, 432, 435 (1987) (Pattern requires that the predicate acts be "representative of the defendant's normal and ongoing course of conduct * * *. In sum, plaintiff must plead that defendant is an habitual criminal").[4]

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[4] To the extent the Court believes the definition of "pattern" is ambiguous notwithstanding the plain language and history of RICO, the rule of lenity provides additional support for our proposed definition. See, *e.g.*, *FCC* v. *American Broadcasting Co.*, 347 U.S. 284, 296 (1954) (a statute that has both criminal and civil provisions must be interpreted in light of "the well-established principle that penal statutes are to be construed strictly"). The various pattern standards advanced by petitioners and their *amici*, and by the courts of appeals other than the Eighth Circuit, represent broad and amorphous tests that unduly expand the reach of RICO and fail to give adequate notice of the prohibition and sanctions to which the defendant is subject (*i.e.*, that particular conduct is a RICO violation and not simply a series of predicate offenses).

Application of the rule of lenity is not barred by the "liberal construction" clause in RICO, which provides that "[t]he provisions of this title shall be liberally construed to effectuate its remedial purposes." Pub. L. No. 91-452, § 904(a), 84 Stat. 947, 18 U.S.C. § 1961 note. As discussed above, the "purposes" of the statute were to strike at organized crime and professional career criminals; an expansive definition of "pattern" that brings legitimate businessmen and garden-variety commercial disputes within the statute is hardly necessary to effectuate those purposes. The Court in *Sedima* recognized that "[t]he strict- and liberal-construction principles are not mutually exclusive"; the definitional and substantive provisions in Sections 1961 and 1962, which apply to both criminal and civil actions, "can be strictly construed without adopting that approach" in interpreting the private damages remedy in Section 1964(c), "where RICO's remedial purposes are most evident" (473 U.S. at 492 n.10).

3. *Predicate Acts Of Racketeering Constitute A Pattern Only If They Are Typical And Characteristic Of The Way In Which The Defendant Conducts His Activities*

As we have shown, the term "pattern" should be construed to require that the predicate acts of racketeering constitute a typical and characteristic course of criminal conduct. But that formulation does not answer the question of what must be typified: to what are the predicate acts to be compared in order to determine whether they are typical and characteristic? In our view, the pattern element focuses on the conduct of the defendant and serves to demarcate the category of people who are the intended target of RICO: professional or habitual criminals who engage in racketeering crimes as a regular course of conduct. Under this standard, predicate acts of racketeering constitute a pattern only if they are typical and characteristic of the way in which the defendant conducts his activities.

This interpretation is supported by three overriding considerations. First, it gives the same meaning to the term "pattern" in each of the provisions of Section 1962,

which is the statutory structure Congress most likely intended. See *Sedima*, 473 U.S. at 489 ("[w]e should not lightly infer that Congress intended the [same] term to have wholly different meanings in neighboring subsections"). Second, it is most faithful to the legislative history of RICO. And third, it provides a meaningful and workable standard that, consistent with congressional intent, limits the statute to its proper scope and restrains abuses of the private treble-damages provision.

We start with the language of RICO.[5] Section 1962(a)—which prohibits the investment in an enterprise of income derived from a pattern of racketeering activity—clearly contemplates that the pattern element will be measured by reference to the activities of the defendant; it is plainly the defendant's criminal conduct in obtaining the money, which is then invested in an enterprise, that is the focus of the pattern requirement. Thus, where the defendant typically and characteristically engages in a course of racketeering acts, his conduct constitutes a pattern of racketeering activity, and his investment of the proceeds of those crimes violates Section 1962(a).

The same definition of "pattern" is equally applicable in Sections 1962(b) and 1962(c). In each subsection, the pattern element should be defined to require that the predicate acts be typical and characteristic of the defendart's activities. As in subsection (a), the pattern requirement identifies the type of professional or habitual criminal who is subject to the severe sanctions of RICO.

Of course, pattern is not the only element of a violation under Section 1962(b) or (c). In addition, the de-

[5] Because "the major purpose of [RICO] is to address the infiltration of legitimate business by organized crime" (*United States* v. *Turkette*, 452 U.S. 576, 591 (1981)), Sections 1962(a) and 1962(b) are especially significant in discerning the congressional intent underlying the statute. Section 1962(c) was added to the bill at the suggestion of the Department of Justice to prohibit criminal conduct by racketeers once they had infiltrated the enterprise. See *Measures Relating to Organized Crime: Hearings Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 387 (1969).

fendant must acquire or maintain an interest in the enterprise, or conduct the affairs of the enterprise, "through" his racketeering activity. The term "through" requires that there be a causal connection between the defendant's criminal conduct and the enterprise. Sections 1962(b) and (c) are violated only when the defendant acts "through"—that is, as part of or by means of—a pattern of racketeering activity in order to infiltrate or operate the enterprise. See *Sedima*, 473 U.S. at 496-497 ("[M]ere commission of the predicate offenses * * * [is] not in itself a violation of § 1962 * * *. [T]he essence of the violation is the commission of those [predicate acts forming a pattern] in connection with the conduct of an enterprise"); 116 Cong. Rec. at 18940 (remarks of Sen. McClellan) ("[u]nless an individual * * * engages in a pattern of such violations, and uses that pattern to obtain or operate an interest in an interstate business, he is not made subject to proceedings under [RICO]").

Thus, the unified standard of "pattern" we propose leads to a consistent and coherent interpretation of each of the provisions of Section 1962. Under this reading of the statute, the predicate racketeering acts must be part of a course of criminal conduct that is typical and characteristic of the way the defendant conducts his activities (the "pattern" element) and must have the required nexus to the enterprise (the "through" element) for the particular RICO violation alleged. RICO is violated if the defendant, as part of or by means of a pattern of racketeering activity sufficient to mark him as a professional or habitual criminal, (a) derives income that he invests in an enterprise, (b) acquires or maintains an interest in an enterprise, or (c) conducts the affairs of an enterprise.

By contrast, alternative typicality standards do not permit a uniform interpretation of the pattern element. If the pattern requirement turns on whether racketeering acts are typical of the enterprise itself and its overall operations, as Section 1962(c) plausibly can be read to

say, that standard would be inapplicable to subsections (a) and (b), which do not depend upon the nature or character of the enterprise. Likewise, an interpretation that requires the racketeering acts to be typical of the defendant's relationship to or activities concerning the enterprise—that is, that they be typical of the way in which he acquired or maintained an interest in the enterprise or conducted the enterprise's affairs—while a plausible reading of Sections 1962(b) and (c), cannot be squared with subsection (a). Accordingly, in order to give the term "pattern" a single consistent meaning, as *Sedima* requires, it should be construed to mean that the predicate acts of racketeering must be typical and characteristic of the activities of the defendant.

In addition to being supported by the text of RICO, this definition of "pattern" best comports with the legislative history of the statute. As described above (see pages 9-14, *supra*), RICO is directed at members of organized crime and other professional or career criminals for whom ongoing criminality is a way of life. The construction we propose precisely captures this purpose by using the pattern element to identify such people as the category of defendants who are subject to RICO.

This standard would allow RICO to be invoked in the kinds of cases that were Congress's target in enacting the statute. The organized crime member who takes over or operates a company through acts of violence or fraud, the beer distributor or jukebox supplier who conducts his business by force and threats against reluctant customers or competitors, the "boiler room" operator who sells fraudulent securities, the motorcycle gang that is in the business of selling drugs or committing arson-for-hire—all of these situations, which were the intended focus of RICO, would remain well within the ambit of the statute.[6]

[6] The legislative history offers an example (116 Cong. Rec. at 607, 18940, 36296), which petitioners cite (Br. 17), of the leader of the New Jersey Cosa Nostra using murder and arson to sell substandard laundry detergent to the A&P Tea Company. This example is easily encompassed by our pattern definition.

Our proposed pattern definition likewise would not interfere with proper criminal enforcement of RICO. RICO's sanctions would remain fully available in the great run of cases, involving professional criminals and illegitimate enterprises-in-fact, in which the government has actually brought criminal prosecutions. Indeed, the Department of Justice Guidelines on RICO already direct federal prosecutors that "[n]o indictment shall be brought charging a violation of 18 U.S.C. § 1962(c) based upon a pattern of racketeering activity growing out of *a single criminal episode or transaction*." United States Attorneys' Manual § 9-110.340 (Mar. 9, 1984) (emphasis added). See pages 5-6, *supra*.

At the same time, this definition will restrict RICO to its proper scope in a way that is both more meaningful and more practical than alternative standards. An inherent difficulty in formulations that tie the pattern to either the enterprise or the defendant's relationship with the enterprise is that the term "enterprise" is exceedingly broad. See 18 U.S.C. § 1961(4); *United States* v. *Turkette*, 452 U.S. 576 (1981). It is up to the plaintiff to allege the relevant enterprise in any particular case (or even different enterprises for different RICO counts in the same case, as this litigation illustrates), and the enterprise allegations are often manipulated through "artful[] plead[ing]" (*Jones* v. *Lampe*, 845 F.2d at 757). Thus, under any legal standard that focuses the pattern requirement on the enterprise, the plaintiff can effectively determine the pattern issue by virtue of his control over the enterprise allegations. For this reason, two RICO cases that are otherwise identical, but involve different enterprise allegations, could arbitrarily lead to different results.

Of equally great importance, this interpretation of the pattern element provides a workable standard that can feasibly be applied in litigation. Consistent with the requirement of Fed. R. Civ. P. 11 that a complaint be "warranted" by law and "not interposed for any improper purpose," a great many inappropriate RICO cases that

are now being brought simply would not be filed under the proposed pattern test. In addition, improper cases that are nevertheless filed could often be dismissed on the pleadings or after preliminary discovery when there is no reasonable basis for concluding that the pattern element could be satisfied.

In cases that do proceed to trial, this pattern standard can readily be "explain[ed] to a jury" (*Sedima*, 473 U.S. at 495 n.12) in the court's instructions. The ultimate issue for the jury on the pattern element is whether the defendant typically and characteristically conducts his activities by means of acts of racketeering. Among the considerations that a jury should take into account in resolving that issue are: (1) the number and frequency of the racketeering acts (or episodes or transactions); (2) the nature of the predicate acts and any inference that the defendant engaged in that type of crime on an ongoing and regular basis; (3) the extent of the defendant's business that was involved in the racketeering acts; (4) the proceeds that the defendant received from the racketeering acts in relation to any legitimate sources of income; and (5) any indications that the defendant was not involved in a legitimate business, such as failure to comply with applicable state or federal requirements, an inadequate capital structure, or other earmarks of a "front" or "dummy" company. While it is, of course, possible to envision cases that present close questions of statutory coverage, instructions along the foregoing lines should provide suitable guidance for the jury's determination of the pattern issue.

The nature of the proof necessary to establish a pattern will depend upon the circumstances of the particular case. For example, two instances of certain racketeering offenses—such as extortion, contract murder, or arson-for-hire—may provide a basis for a jury to find that the defendant is a professional or habitual criminal, especially if proof of those offenses is accompanied by corroborative evidence such as the absence of any legitimate source of income for the defendant or indications that

he planned to commit those crimes in the future. Similarly, a jury could conclude that the pattern element is satisfied by proof of two or more acts of wire or mail fraud by a "shell" corporation whose entire operation involves fraudulent practices—the classic "boiler room" scheme. And it would be sufficient to show that the defendant engaged in numerous episodes of racketeering over a significant period of time from which he received substantial income, even though he had lawful income as well. On the other hand, the fact that employees of one division of a large corporation allegedly mailed misleading documents on two or more occasions would not give rise to an inference that the corporate defendant was an habitual criminal and would not be enough to avoid pretrial dismissal of the complaint.

In the present case, application of this pattern standard is straightforward and leads to affirmance of the judgment below. The complaint does not, and plausibly could not, allege that Northwestern Bell's business was typically and characteristically conducted through the alleged bribery scheme or other racketeering activity. As the district court determined, "[i]t cannot be said • • • that the alleged 'pattern' of predicate acts is a 'regular part of the way' defendants conduct their business" (653 F. Supp. 908, 916). Because Northwestern Bell does not fall within the category of professional criminals against whom RICO was directed, petitioners' complaint was properly dismissed.

D. The Pattern Definitions Advanced By Petitioners And The Solicitor General Are Neither Legally Supported Nor Adequate To Curtail The Widespread Abuse Of Civil RICO

As all of the members of the Court agreed in *Sedima*, civil RICO has been subject to substantial abuse. The pattern definitions proposed by petitioners and the Solicitor General are neither adequate to curtail these abuses nor supported by the language and history of the statute.

1. *Civil RICO Has Been Subject To Serious Abuse*

The Court in *Sedima* recognized that civil RICO has "evolv[ed] into something quite different from the original conception of its enactors" (473 U.S. at 500). Indeed, "private civil actions under the statute are being brought almost solely against [respected and legitimate businesses], rather than against the archetypal, intimidating mobster" (*id.* at 499). "In practice, [civil RICO] frequently has been invoked against legitimate businesses in ordinary commercial settings" (*id.* at 506 (Marshall, J., dissenting)), and "private civil actions [are] being brought frequently against respected businesses to redress ordinary fraud and breach of contract cases" (*id.* at 524 (Powell, J., dissenting)). Former Senator Hruska has also recently noted that civil RICO is being used in ways that Congress did not intend and would not have approved. See *Oversight on Civil RICO Suits Brought Under 18 U.S.C. 1964(c): Hearings Before the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. 9 (1985) ("*Senate Hearings*"); Note, *Civil RICO—What Hath Congress Wrought?*, 20 Creighton L. Rev. 1225, 1225 (1987).

In fact, as the Department of Justice has observed, civil RICO has become "a general federal anti-fraud remedy," and its application against "traditional organized criminal activities" is "far outweighed" by its use against "reputable businessmen." *Senate Hearings*, *supra*, at 140 (statement of Assistant Attorney General Trott). In 1985 and 1986, 92% of all reported civil RICO cases did not involve allegations of racketeering acts characteristic of professional criminal activity; on the contrary, of cases subsequent to *Sedima*, 59% alleged mail fraud as the predicate offenses, 51% alleged wire fraud, and 20% alleged securities fraud. Blakey & Cessar, 62 Notre Dame L. Rev. at 619, 620. Nearly all of these suits were ordinary civil disputes masquerading as racketeering cases.

As noted by Judge Mikva, "a RICO count is filed almost as boilerplate" in many federal suits, much "like the ad damnum clause in a complaint." *RICO Reform Legislation: Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 99th Cong., 1st & 2d Sess. 527 (1985-1986) ("*House Hearings*"). The reasons for this misuse are self-evident: RICO—by affording treble damages and attorneys' fees, by stigmatizing the defendant as a "racketeer," and by conferring federal jurisdiction—provides an "unusually attractive civil remedy" (*id.* at 366 (letter from Assistant Attorney General Bolton)). See *Sedima*, 473 U.S. at 504 (Marshall, J., dissenting). Moreover, unlike criminal enforcement of RICO, private damages suits can be filed by hyper-aggressive litigants and are not restrained by "[t]he responsible use of prosecutorial discretion" (*id.* at 503 (Marshall, J., dissenting)).

Abuse of civil RICO creates a host of undesirable consequences that Congress—in its brief consideration of the private damages provision—surely could not have intended. First, "there has been an explosion of private civil RICO lawsuits" that has placed an "inappropriate and increasingly heavy burden" on the federal courts. *House Hearings*, *supra*, at 366 (letter from Assistant Attorney General Bolton). In 1986, more than 1000 private civil RICO cases were filed in federal court;[7] since approximately one-third to one-half of all civil RICO filings had no other basis for federal jurisdiction (see Blakey & Cessar, 62 Notre Dame L. Rev. at 619, 622), a proper construction of RICO would remove a great deal of burdensome litigation from federal court.[8]

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[7] By contrast, only 120 criminal RICO indictments were approved for filing by the Department of Justice in 1986. See Goldsmith, *RICO and Enterprise Criminality*, 88 Colum. L. Rev. 774, 790 n.113 (1988).

[8] These figures do not tell the full story, for, as the Judicial Conference has explained, "the number of civil RICO cases is substantially larger than can be statistically documented" and such cases "require a disproportionately large amount of time to re-

In addition, overly broad application of civil RICO "displaces important areas of federal law" (*Sedima*, 473 U.S. at 504 (Marshall, J., dissenting)) by allowing private damages suits without regard to limitations that exist under other federal statutes. See *House Hearings*, *supra*, at 365 (letter from Assistant Attorney General Bolton), 529 (statement of Judge Mikva). For instance, as then-SEC Chairman Shad explained, the use of mail and wire fraud as predicate offenses in civil RICO suits "has preempted much of th[e] field" of federal securities laws, thus "substantially altering the balance of private and public rights" that "Congress, the courts, and the Commission have crafted over the past 50 years." *House Hearings*, *supra*, at 445-446. See also *Sedima*, 473 U.S. at 505 (Marshall, J., dissenting).

In much the same way, an expansive interpretation of RICO would "federalize[] important areas of civil litigation that until now were solely within the domain of the States," thereby "altering fundamentally the federal-state balance" (*Sedima*, 473 U.S. at 504 (Marshall, J., dissenting)). Ordinary commercial disputes that otherwise would be subject to state law, and adjudicated in state courts, are now routinely transformed into federal RICO claims. See, *e.g.*, Report of the Proceedings of the Judicial Conference of the United States, Mar. 12-13, 1986, at 11-12 (RICO has "caus[ed] what would formerly have been considered routine breach of contract or common law fraud actions triable only in state courts * * * to be filed in federal courts," which "causes friction with the state court system").

Finally, the bludgeon of civil RICO is frequently used by plaintiffs to coerce lucrative settlements of unmeritorious claims. As Justice Marshall explained in *Sedima* (473 U.S. at 504, 506 (dissenting opinion)):

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solve." Report of the Proceedings of the Judicial Conference of the United States, Sept. 21, 1987, at 76. Moreover, "the impact on the federal courts of suits brought under * * * [civil RICO] grows daily more acute." Report of the Proceedings of the Judicial Conference of the United States, Mar. 17, 1987, at 19.

> [T]he defendant, facing a tremendous financial exposure in addition to the threat of being labelled a "racketeer," will have a strong interest in settling the dispute.
>
> * * * * *
>
> Many a prudent defendant, facing ruinous exposure, will decide to settle even a case with no merit. It is thus not surprising that civil RICO has been used for extortive purposes, giving rise to the very evils that it was designed to combat.

Indeed, "often [the] sole effect [of including a RICO count] is intended to or at least has the effect of pressing the other side into a settlement." *House Hearings*, *supra*, at 527 (statement of Judge Mikva).

Thus, abusive civil RICO suits "take their toll; their results distort the market by saddling legitimate businesses with uncalled-for punitive bills and undeserved labels" (*Sedima*, 473 U.S. at 520 (Marshall, J., dissenting)). Without question, civil RICO litigation "presents a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general." *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 739 (1975). As the Court recognized in *Blue Chip Stamps* with respect to "nuisance or 'strike' suits" under the securities laws, "even a complaint which by objective standards may have very little chance of success at trial has a settlement value to the plaintiff out of any proportion to its prospect of success at trial so long as he may prevent the suit from being resolved against him by dismissal or summary judgment" (*id.* at 740).

A proper pattern definition is critical to the sound application of civil RICO. See pages 4, 12, *supra*. As this Court recognized in *Sedima*, the present abuse of civil RICO has occurred primarily because of the lack of "a meaningful concept of 'pattern'" (473 U.S. at 500). Many inappropriate civil RICO cases have been sustained by the lower courts under lax pattern standards. See, *e.g.*, *R.A.G.S. Couture, Inc.* v. *Hyatt*, 774 F.2d 1350 (5th Cir. 1985) (two fraudulent mailings to a single victim

in a five-month period constituted a pattern because the acts were related and not isolated); *Environmental Tectonics* v. *W.S. Kirkpatrick Inc.*, No. 87-5328 (3d Cir. May 2, 1988) (one bribe to a foreign government official to influence one contract, in violation of several statutes and occurring in several installments, constituted a pattern); *Sun Sav. & Loan Ass'n* v. *Dierdorff*, 825 F.2d 187 (9th Cir. 1987) (four mailings over five months to cover up a kickback were not isolated or sporadic and hence constituted a pattern).

Our proposed pattern definition would provide a significant check on such abuses. By contrast, as we now discuss, the standards proposed by petitioners and the Solicitor General would be ineffective in curbing RICO misuse and represent a faulty analysis of the statute.

2. *The Pattern Definitions Urged By Petitioners And The Solicitor General Are Unsound And Should Be Rejected*

Although petitioners are far from clear in the definition they propose (see Pet. Br. 24-31), in the end they seem to urge a standard that "look[s] at the racketeering acts and the activity prohibited under § 1962(a), (b), (c) or (d), and/or the relationship of the acts to the enterprise and/or the acts and the nature of the enterprise itself" (*id.* at 32). It need hardly be said that this is no standard at all; indeed, petitioners acknowledge that their discussion "only illustrate[s] the type of factors" (*id.* at 34) that might be relevant. The only thing that is clear is that petitioners' approach is exceedingly broad, allowing two acts to establish a pattern provided only that they are related (*id.* at 33). Moreover, contrary to *Sedima*, the meaning of the term "pattern" under petitioners' proposal "changes depending upon which subsection of [Section 1962] is alleged" (*ibid.*). And petitioners' formulation would be completely unworkable in practice, since it is incapable of application on pretrial motions and would invariably make the pattern issue a question for the "finder of fact" based on "the total

factual context of each case" (*id.* at 32). Such a nebulous standard, combined with the lure of treble damages and attorneys' fees, would invite a flood of ungovernable RICO suits in federal court.

Many of the same criticisms also apply to the lax pattern standard advocated by the Solicitor General: "a RICO pattern is present whenever the defendant's acts of committing the predicate offenses are not isolated or sporadic" (U.S. Br. 4). The Solicitor General provides no definition or test for deciding whether racketeering acts are "isolated" or "sporadic." Furthermore, he ignores the plain meaning of "pattern" as acts that are "typical" or "characteristic." There is a broad middle ground between "sporadic" and "typical"; the fact that something is not sporadic does not mean, as the government contends, that it is typical.

The Solicitor General's interpretation is sweeping in its coverage. In his view, it is sufficient (although not necessary, see U.S. Br. 6, 10 n.5) that "the acts form a pattern by virtue of a connection to a common scheme, plan, or motive" (*id.* at 5). But that condition will routinely be satisfied unless the acts are entirely random and unorganized; in the real world it will be rare that the predicate acts will not be connected by a "common scheme, plan, or motive." In addition, the government reads the pattern element to "contain[] no requirement that the predicate crimes be separated by any particular interval in time" (*id.* at 14 n.7). Thus, a single criminal episode or transaction that technically involves two offenses—such as a fraudulent statement made in two letters written and mailed at the same time—is automatically a "pattern." Virtually any two acts of racketeering will be included.

In essence, the Solicitor General's test requires relatedness but disregards continuity. Under his standard, pattern subsumes any "groups of predicate crimes that are connected in some way" (U.S. Br. 10). The government's

all-inclusive approach parallels the Fifth Circuit's decision in *R.A.G.S. Couture* (see pages 25-26, *supra*), which has been universally criticized—by the Fifth Circuit itself and even by proponents of broad civil RICO—for upholding a pattern whenever two racketeering acts are related and not isolated. See, *e.g.*, *Condict* v. *Condict*, 826 F.2d at 929; *Montesano* v. *Seafirst Commercial Corp.*, 818 F.2d 423, 424-426 (5th Cir. 1987); Blakey & Cessar, 62 Notre Dame L. Rev. at 538 n.37.

Recognizing the expansiveness of his approach, the Solicitor General points to the "enterprise" element to argue that his pattern definition "does not convert every series of related criminal acts into a RICO violation" (U.S. Br. 12). Given the breadth of the term "enterprise" in Section 1961(4) and this Court's decision in *Turkette*, however, this statement is cold comfort indeed. Seldom will two or more racketeering acts not involve, at the least, a "group of individuals associated in fact although not a legal entity" (18 U.S.C. § 1961(4)). Under the government's construction, precious little criminal conduct involving enumerated predicate offenses would be outside the scope of RICO, a result that Congress surely did not intend.

Beyond these difficulties, the Solicitor General's brief totally ignores the fact that this is a *civil* RICO case. His entire argument is framed by reference to *criminal* prosecutions, and in particular to prosecutions involving illegitimate enterprises (see U.S. Br. 12, 19). Nowhere does the Solicitor General so much as mention, let alone propose a solution for, the substantial abuses of civil RICO that *Sedima* recognized and the legal community has widely condemned. In fact, he disclaims the application of his pattern definition to cases involving legitimate enterprises (*id.* at 19 n.10), which would include almost all civil RICO suits. The government has simply failed to come to grips with the problem before the Court.

Finally, contrary to the Solicitor General's argument (U.S. Br. 8-10), RICO is not subject to the definition of

"pattern" contained in the dangerous special offender statute, 18 U.S.C. § 3575(e), repealed effective November 1, 1987, Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 212(a)(2), 98 Stat. 1987, and Sentencing Reform Amendments Act of 1985, Pub. L. No. 99-217, § 4, 99 Stat. 1728. Since Section 3575 was enacted together with RICO as part of the Organized Crime Control Act of 1970, the Court's analysis in *Russello* is directly applicable here: "'[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion'" (464 U.S. at 23). "If this was Congress's intent [to include the Section 3575(e) definition in RICO], one would expect it to have said so in clear and understandable terms" (*id.* at 25).

Furthermore, the government has offered no reason to believe that Congress *sub silentio* would have intended to transpose a definition contained in the dangerous special offender statute—a sentence-enhancement provision that is applied in the discretion of the court and has no private enforcement mechanism—to RICO, which is a substantive provision whose treble-damages remedy can be invoked entirely at the behest of a private party. Given these differences between the statutes, it is perfectly understandable why Congress adopted a broader definition of "pattern" in the dangerous special offender act than in RICO.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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IN THE
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OCTOBER TERM, 1987

H.J. INC., *et al.*,
Petitioners,

v.

NORTHWESTERN BELL TELEPHONE COMPANY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* SUPPORTING RESPONDENTS

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This brief *amicus curiae* is filed with the consent of the parties, as provided for in the Rules of the Court.

INTEREST OF THE *AMICUS CURIAE*

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) is a federation of 90 national and international unions with a total membership of over 13,000,000 working men and women. Private civil RICO actions have become a tool for harassment through the bringing of strike suits against legitimate business and labor organizations. Such suits are outside the ambit of the statute properly interpreted as we show in the argument that follows.

SUMMARY OF ARGUMENT

The overall purpose of the Organized Crime Control Act of 1970—of which the Racketeer Influenced and Corrupt Organizations Title is one part—was to deal with the discrete law enforcement problems presented by organized crime. Congress believed the laws then on the books were sufficient to deal with wrongs, including repetitive wrongs, committed by legitimate businesses and unions. But Congress concluded that organized crime—by which term Congress had in mind specifically the Mafia—presented a particularly virulent strain of self-perpetuating criminality that had proved resistant to conventional methods of legal control.

In this brief, we analyze the language and the history of the RICO Title's "pattern of racketeering activity" requirement. We show that Congress intended that to the extent possible the unique and far-reaching prohibitions, penalties, and remedies of RICO would apply only to organized crime. The pattern requirement was the means by which Congress sought to accomplish that purpose. Congress intended that requirement to assure that RICO would be applicable only to organized crime or to groups that have the characteristics that are the hallmarks of organized crime.

Reading the words of the statute in light of the clearly expressed congressional objective points to the following conclusion: The connective link necessary to meet the pattern requirement is a showing that the ongoing criminal conduct in question is the work of a group dedicated to the pervasive, self-reinforcing and self-perpetuating commission of offenses that constitute racketeering activity. Under this standard, the allegations of the complaint here are insufficient to charge Northwestern Bell or its officers and agents with engaging in a pattern of racketeering.

ARGUMENT

Introduction

The instant case raises in sharp relief the following question: does a plaintiff (or a prosecutor) state a case under the "Racketeer Influenced and Corrupt Organizations" (RICO) Title of the Organized Crime Control Act of 1970, by pleading that certain officials and agents of a business corporation—which, in fact, provides a useful, lawful service (here a telephone company)—have repeatedly over a number of years committed a particular type of criminal wrong (here bribery of public officials who regulate the Company's operations) in order to further the corporation's business interests? We submit that the answer to that question is "no."[1]

Repetitive wrongdoing—especially criminal wrongdoing—by businesses in order to increase their income or expand their market is, it goes without saying, a serious social problem, and such a course of conduct has long been subject to sanction under numerous state and federal laws. But Congress, in enacting the Organized Crime Control Act, proceeded on the premise that those laws are sufficient to contain that type of wrongdoing.

The 1970 Congress was concerned instead with a strain of wrongdoing that, in its judgment, is more virulent, more resistant to conventional legal redress and that, therefore, poses an even greater threat to the body politic: wrongdoing by organized groups formed and maintained to engage in certain types of criminal activity. The distinguishing feature of these groups is that *both their means and their ends are criminal.* Such groups, in Congress' judgment, and this seems intuitively correct, are particularly dangerous because

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[1] Because of the facts of this case, in this brief we discuss the issue presented in terms of RICO's proper application to businesses such as Northwestern Bell. The analysis is equally applicable to RICO's proper application to AFL-CIO unions.

their criminal activity is self-perpetuating: the proceeds of each successful criminal act are used to finance both the continuation of the criminal enterprise and the commission of further crimes. Organized crime acitvity, in other words, has a metastasizing quality that sets it apart from other types of wrongdoing whether the others are repetitive or not.

Because it has been such a point of controversy, we hasten to add that while Congress viewed the Mafia as the paradigm example of organized crime, RICO is not limited to individuals or groups of individuals who are racketeers, in some colloquial sense. Rather, our point is that Congress, by reason of its investigations, came to a conclusion as to the characteristics of organized crime as a class and determined to authorize the use of innovative and far-reaching fact-finding procedures and remedial schemes against, and *only* against, those who share those characteristics.

I. The Overall Purposes Of The Legislation.

As we develop below, the most critical operative term in the RICO Title of the Organized Crime Control Act is "pattern of racketeering activity." It facilitates the understanding of that term, which is *not* defined in the Act, to begin by reviewing the legislation's overall purposes which are described with clarity and in detail in § 1:

> The Congress finds that (1) *organized crime* in the United States is a highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud, and corruption; (2) *organized crime* derives a major portion of its power through money obtained from such illegal endeavors as syndicated gambling, loan sharking, the theft and fencing of property, the importation and distribution of narcotics and other dangerous drugs, and other forms of social exploitation; (3) this

> money and power are increasingly used to infiltrate and corrupt legitimate business and labor unions and to subvert and corrupt our democratic processes; (4) *organized crime* activities in the United States weaken the stability of the Nation's economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden interstate and foreign commerce, threaten the domestic security, and undermine the general welfare of the Nation and its citizens; and (5) *organized crime* continues to grow because of defects in the evidence-gathering process of the law inhibiting the development of the legally admissible evidence necessary to bring criminal and other sanctions or remedies to bear on the unlawful activities of those engaged in *organized crime* and because the sanctions and remedies available to the Government are unnecessarily limited in scope and impact.
>
> It is the purpose of this Act to seek the eradication of *organized crime* in the United States by strengthening the legal tools in the evidence-gathering process,, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in *organized crime*. [Pub. L. No. 91-452, § 1, 84 Stat. 922 (1980); emphasis added.]

The foregoing makes it absolutely plain that Congress had concluded that there is a discrete phenomenon which the Legislature labelled "organized crime," that organized crime presents a special danger to the country, that organized crime could not be controlled by the then-current system of law enforcement and that it is, therefore, necessary to "strengthen[] the legal tools . . . to deal with the unlawful activities of those engaged in organized crime." And it is a fair inference from ¶ 3 of § 1 that organized crime is distinct from "legitimate business and labor unions."

The sponsors of the Organized Crime Control Act, moreover, stated explicitly what "organized crime" en-

compasses. Senator McClellan, quoting President Nixon's "Message on Organized Crime," described organized crime as an "alien organization . . . a totalitarian and closed society operating within an open and democratic one." 116 Cong. Rec. 585 (1970). Organized crime in this country, the Senator explained, "is directly descended from and is patterned upon the centuries-old Sicilian terrorist society, the Mafia. This organization, also known as Cosa Nostra, operates vast illegal enterprises that produce an annual income of many billions of dollars. This combine has so much power and influence that it may be described as a private government of organized crime." *Id.* at 586 (quoting S. Rep. No. 72, *Organized Crime and Illicit Traffic of Narcotics*, 85th Cong., 1st Sess. 117 (1965)). "The most influential" of the organized crime groups are "the 26 families of La Cosa Nostra, estimated to have a total membership of some 3,000 to 5,000." 116 Cong. Rec. 585 (1970). "[T]hese groups," Senator Hruska added, "are allied with other racket enterprises to form a loose confederation operating in both large and small cities." *Id.* at 601. Organized crime groups "are chiefly active in syndicated gambling, the importation, and distribution of narcotics, and loan sharking . . . ." *Id.* at 586 (remarks of Senator McClellan). And Senator Scott summed up the matter in these terms:

> Syndicated crime operates outside legitimate government. It involves thousands of criminals in structures as complex and large as any corporation with laws rigidly enforced through terror. Its operations are national and international. Its aims are to monopolize whole fields of activity—legal and illegal —in order to amass huge profits, currently estimated at several billion dollars each year. [116 Cong. Rec. 819 (1970).]

Title IX of the Organized Crime Control Act—the RICO Title—was designed to address a particular aspect of the threat posed by organized crime: "[T]he major

purpose of Title IX is to address the infiltration of legitimate business by organized crime." *United States v. Turkette*, 452 U.S. 576, 591 (1981). *See* 116 Cong. Rec. 18939 (1970) (RICO "is aimed at removing organized crime from our legitimate organizations") (remarks of Sen. McClellan); 115 Cong. Rec. 9567 (1969) (RICO "is designed to attack the infiltration of legitimate business") (remarks of Sen. McClellan); 116 Cong. Rec. 820 (1970) (RICO is "a means to excise syndicate-infiltrated businesses") (remarks of Sen. Scott); *id.* at 35193 (need "for a frontal attack on the subversion of our economic system by organized criminal activities") (remarks of Rep. Poff); *id.* at 35196 (1970) ("Title IX is designed to inhibit the infiltration of legitimate business by organized crime") (remarks of Rep. Celler); *id.* at 35200 (Title IX "is aimed at keeping organized crime out of legitimate businesses") (remarks of Rep. St. Germain).[2]

There is no allegation here that Northwestern Bell or the persons who direct Northwestern Bell are part of, or associated with, "organized crime" as that term was understood by the Congress that enacted RICO. This case then is one more of the myriad of cases in which the plaintiffs seek a judicial ruling that continues a process whereby "RICO is evolving into something quite different from the original conception of its enactors." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 500 (1985).

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[2] In *Turkette*, this Court interpreted Title IX also to reach organized crime activities that are wholly illegitimate:

> In view of the purposes and goals of the Act, as well as the language of the statute, we are unpersuaded that Congress nevertheless confined the reach of the law to only narrow aspects of organized crime, and, in particular, under RICO, *only* the infiltration of legitimate business. [452 U.S. at 590; emphasis in original.]

The ultimate question posed by this case is whether that process of evolution correctly captures the meaning of the statutory words Congress used to express that conception. If so, the task of correcting the divergence between the enactors' conception and the articulation of that conception in positive statutory law would be for Congress; if not the task of correlating the two is for this Court.

II. The RICO Title.

A. *The Statutory Language*

As we noted at the outset the concept of a "pattern of racketeering activity" is at the core of each of the RICO Title's prohibitions, and the meaning of that concept is of the essence here. Those prohibitions are fully stated in 18 U.S.C. § 1962: § 1962(a) prohibits the investment in an enterprise of income derived through a pattern of racketeering activity; § 1962(b) prohibits the acquisition or maintenance of an interest in an enterprise through a pattern of racketeering activity; and § 1962(c) prohibits the conduct of affairs of an enterprise through a pattern of racketeering activity. Very simply stated, there can be no RICO violation without proof of a "pattern of racketeering activity."

RICO does provide a definition of "racketeering activity" in the normal sense of a definition. Section 1961(1) states that "racketeering activity" is the commission of any one of a list of specified federal and state crimes. The offenses on that list were selected because the crimes are "committed by organized crime with substantial frequency, as part of [organized crime's] commercial operations." 116 Cong. Rec. 18940 (1970). In contrast § 1961(5) which concerns "*pattern* of racketeering activity" is not a definition at all but a statement of a minimum proof requirement:

> "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity.

As Senator McClellan, the sponsor of, and floor leader for, the bill in the Senate, stressed:

> [A] careful reading of title IX would have informed . . . that a pattern under title IX is not defined as two or more acts of racketeering activity, but requires them. [116 Cong. Rec. 18940 (1970).]

And as this Court added in *Sedima*:

> [T]he definition of a "pattern of racketeering activity" differs from the other provisions of § 1961 in that it states that a pattern "*requires* at least two acts of racketeering activity," § 1961(5) (emphasis added), not that it "means" two such acts. The implication is that while two acts are necessary, they may not be sufficient. Indeed, in common parlance two of anything do not generally form a "pattern." [473 U.S. at 496 n.14.]

Thus, the scope of the RICO Title turns on the meaning of one word—"pattern"—and that word is used but not specifically defined in RICO. And this Court has stated that where a term "is not specifically defined in the RICO statute [, t]his silence compels us to 'start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used.'" *Russello v. United States*, 464 U.S. 16, 21 (1983). *See also Organized Crime Control: Hearings on S. 30 and Related Proposals Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 91st Cong., 2d Sess. 665 (1970) (hereinafter "House Hearings") (statement of Ronald L. Gaines, United States Department of Justice) (the bill "says 'pattern,' and pattern has to be construed with its normal meaning").

The relevant dictionary definitions of "pattern" include: "something regarded as a normative example to

be copied"; an "archetype"; an "exemplar"; "a representative instance"; "a typical example"; "a specimen offered as a sample of the whole"; "a reliable sample of traits, acts, or other observable features characterizing an individual." Webster's Third New International Dictionary 1657 (1971).

Thus, where a pattern of human behavior exists, repetitive sampling of events over time should reveal a common mode of conduct. Accordingly, with particular respect to "pattern" in the context of human behavior, the dictionary states: "a regular, mainly unvarying way of acting or doing." Webster's New World Dictionary 1042 (2d college ed. 1984). "Pattern" may be a synonym for "habit," "custom," "practice," or "characteristic." Roget's International Thesaurus ¶ 642.4 at p. 494 (4th ed. 1977).

This Court has, indeed, interpreted the word "pattern" in similar fashion in construing the meaning of the "pattern or practice" requirement in § 707(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-6 (a). *Teamsters v. United States*, 431 U.S. 324, 336 (1977), states:

> [B]ecause it alleged a systemwide pattern or practice of resistance to the full enjoyment of Title VII rights, the Government ultimately had to prove more than the mere occurrence of isolated or "accidental" or sporadic discriminatory acts. It had to establish by a preponderance of the evidence that racial discrimination was the company's *standard operating procedure*—the *regular* rather than the *unusual* practice. [Emphasis added.]

Thus, at the very least, a plaintiff (or a prosecutor) in a RICO action must establish that the "racketeering activity" alleged (and proved) is an example of the defendant's "regular, mainly unvarying way of acting or doing," or is "custom[ary]," or is "characteristic" of the defendant's behavior.

B. *The Congressional Intent*

The pure definition of pattern—left wholly at large without any context—still leaves us somewhat short of what we would ideally wish to know in order to be able to interpret the RICO Title correctly. What is to this point lacking is an understanding of the function Congress intended the pattern requirement to perform in the overall RICO scheme.

That understanding is necessary in order to choose between the two types of patterns Congress might have had in mind. Was Congress' concern that the plaintiff (or prosecutor) show a number of racketeering crimes sufficient to support a rational inference that committing such wrongs is characteristic of the defendant's behavior? Or, as is suggested by the materials discussed *supra* at 4-7, was Congress' concern that the plaintiff (or prosecutor) show that the racketeering activity is of the same nature and quality as the wrongful activity that is characteristic of organized crime as a class? While the relevant legislative discussion is of limited scope, it is the second understanding of the pattern requirement that best captures Congress' intent.

In the earliest efforts to fashion stronger law enforcement tools against organized crime, Senator McClellan sought to make it a crime to be a member of the Mafia or of similar criminal organizations. Thus, in 1965 Senator McClellan introduced S. 2187, 89th Cong., 1st Sess., which made it "a violation of Federal law for any person to join the Mafia or any other organization which is dedicated to the commission of crimes." 111 Cong. Rec. 14641 (1965) (remarks of Sen. McClellan). In 1967, the Senator introduced a bill based on the same approach which would have made it a crime to be a member of any organization "having for one of its purposes" the violation of the criminal laws "relating to gambling, extortion, blackmail, narcotics, prostitution, or labor-

racketeering." S. 678, 90th Cong., 1st Sess., *reprinted at* 113 Cong. Rec. 1595 (1967). Senator McClellan explained that "[o]rganized crime syndicates in this country are a fact, and Congress should combat this danger with every possible means." *Id.* at 1585.

The proposal to create a crime based on membership in a group was thought to raise a number of significant constitutional questions. Attorney General Katzenbach in his testimony cited possible violations of the First and Fifth Amendments: "[the legislation] raises a number of constitutional questions of such substance that at the very least its effectiveness is likely to be impaired by prolonged litigation." 116 Cong. Rec. 35344 (1970) (quoted in remarks of Rep. Poff). And Senator Hruska, while describing the objectives of S. 678 as "most laudable," could not "in good conscience support [the bill], as there appear to be several fundamental constitutional questions which would arise should the bill become law." 113 Cong. Rec. 1595 (1967).[3] Neither of these bills was enacted by Congress.

Then, in 1969, Senator McClellan introduced S. 1861, 91st Cong., 1st Sess., the bill that ultimately became the RICO Title of the Organized Crime Control Act.[4] Like its predecessors, S. 1861 was aimed at combating organized crime. As Senator McClellan explained on introducing the bill: "The problem, simply stated, is that organized crime is increasingly taking over organizations

[3] The same objections were raised against an amendment to RICO, employing a similar approach, that was proposed by Rep. Biaggi after the Senate's passage of the bill in 1970. 116 Cong. Rec. 35344 (remarks of Rep. Poff); *id.* at 35343-44 (remarks of Rep. Celler).

[4] S. 30, 91st Cong., 1st Sess., which became the Organized Crime Control Act, was introduced on January 15, 1969. During the legislative process S. 30 was amended through the incorporation of seven other bills dealing with organized crime. One of those bills, S. 1861, which was introduced on April 18, 1969, 115 Cong. Rec. 9566, became the Act's RICO Title. 116 Cong. Rec. 585 (1970).

in our country . . . . Efforts to dislodge them so far have been of little avail." The aim of the bill was thus "[t]o aid in the pressing need to remove organized crime from legitimate organizations in our country." 115 Cong. Rec. 9567 (1969).

While the objective remained the same, S. 1861 used a different approach to reaching that end. Rather than proscribe mere membership in a group, the bill proscribed conduct characterized by three essential elements. The first is the commission of specified crimes that are commonly associated with organized crime; as finally enacted, these crimes comprise the "racketeering activity" delineated in 18 U.S.C. § 1961(1). The second element is the "pattern of racketeering activity" requirement. And the third element is that the pattern of racketeering activity must be connected with one of the three evils of organized crime specifically addressed in § 1962. *See supra* at 8.

Objections were made to this approach by a number of commentators, and particularly by the American Civil Liberties Union and the Association of the Bar of the City of New York. 116 Cong. Rec. 18912 (1970). A major complaint voiced by these objectors was that the RICO Title was drafted too broadly and would reach persons not connected with organized crime. In particular, the complaint was made that "the list [of offenses constituting racketeering activity] is too inclusive, since it includes offenses which often are committed by persons who are not engaged in organized crime." *Id.* at 18940.

Senator McClellan began his response to this complaint by acknowledging the correctness of the premise:

> The Senate report does not claim, however, that the listed offenses are comitted primarily by members of organized crime, only that those offenses are characteristic of organized crime. The listed offenses lend themselves to organized commercial exploitation,

unlike some other offenses such as rape, and experience has shown they are commonly committed by participants in organized crime. That is all the title IX list of offenses purports to be, that is all the Senate report claims it to be, and that is all it should be.

Members of La Cosa Nostra and smaller organized crime groups are sufficiently resourceful and enterprising that one constantly is surprised by the variety of offenses that they commit. It is impossible to draw an effective statute which reaches most of the commercial activities of organized crime, yet does not include offenses commonly committed by persons outside organized crime as well.

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It is self-defeating to attempt to exclude from any list of offenses such as that found in title IX all offenses which commonly are committed by persons not involved in organized crime. Title IX's list does all that can be expected . . . it lists offenses committed by organized crime with substantial frequency as part of its commercial operations. [116 Cong. Rec. 18940.]

Senator McClellan went on to make clear, however, that RICO was *not* intended to reach beyond organized crime. Senator McClellan explained that the critical limitation is to be found not in the list of predicate crimes but in RICO's other requirements, particularly the pattern requirement.

Thus, Senator McClellan minimized the "danger that commission of such [listed] offenses by other individuals would subject them to proceedings under title IX . . . [,] since commission of a crime listed under title IX provides only one element of title IX's prohibitions." *Id.* at 18940. Senator McClellan then discussed the other elements of the prohibitions, focusing on the pattern requirement.

In this context Senator McClellan left no doubt that the pattern requirement was meant to serve an important substantive role in the RICO scheme: that requirement was designed to guard against the extension of RICO beyond organized crime. Senator McClellan took particular pains in this regard to disclaim the notion that "pattern of racketeering activity" is simply a numerical, rather than a qualitative, requirement:

> [A] careful reading of title IX would have informed the [ACLU] that a pattern under title IX is not defined as two or more acts of racketeering activity, but requires them. As the Senate committee report points out:
>
> > The target of title IX is thus not sporadic activity. The infiltration of legitimate business normally requires more than one "racketeering activity" and the threat of continuing activity to be effective. It is this factor of continuity plus relationship which combines to produce a pattern—report at 158.
>
> The term "pattern" itself requires the showing of a relationship, and the committee report thus reinforces that interpretation. So, therefore, proof of two acts of racketeering activity, without more, does not establish a pattern and the ACLU's fears are unwarranted. [*Id.* at 18940] [5]

This authoritative explanation of the pattern requirement is instinct with the understanding that the require-

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[5] *See also* S. Rep. No. 617, 91st Cong., 1st Sess. 158 (1969) (hereinafter "Senate Report") ("The concept of 'pattern' is essential to the operation of the statute.") The Senate Report also states:

> The concept "pattern" is thought to provide no due process constitutional barrier to criminal sanctions, as a "racketeering activity," defined above, must be an act in itself subject to criminal sanction and any proscribed act in the pattern must violate an independent statute. See *United States v. Nardello*, 393 U.S. 286 (1969). [*Id.*]

The quoted passage proceeds on the understanding that "pattern" provides a means to limit the reach of the legislation only to organized crime without running afoul of the constitutional problems that were incident to the membership approach in the prior bills.

ment imposes a greater burden on the plaintiff (or prosecutor) than a showing of a sufficient number of repetitions of crimes constituting "racketeering activity" to support the inference that committing such crimes is a characteristic of the defendant's behavior. Indeed, had Congress intended merely a numerical requirement, such a requirement could have been stated simply and directly in numerical terms.

The Senate Report quoted by Senator McClellan—S. Rep. No. 617, 91st Cong., 1st Sess. 158 (1969)—confirms that, except for the minimum requirement of two instances of racketeering activity, the pattern requirement calls for a qualitative rather than a quantitative determination. Thus, the Report states: "It is this factor of continuity plus relationship which combines to produce a pattern." *Id.*

"Continuity," to go back to the dictionary, means "a continuous flow, series, or succession; unbroken, coherent whole." Webster's New World Dictionary 308 (2d college ed. 1984). This definition is of a piece with the understanding that "pattern of racketeering activity" requires that the commission of such wrongs be the standard operating procedure, the habitual or customary business, of the defendants. *See supra* at 9-10.

What "relationship" adds to the mix depends on the kind of connective link Congress had in mind; and what Congress had in mind is most clearly revealed by the materials that indicate what Congress was trying to achieve through the pattern requirement. Having moved from an approach based on membership to one based on conduct, Congress needed a means to ensure that the extraordinary remedies and heightened penalties of RICO would apply only to the intended object of the legislation: organized crime. As Senator McClellan emphasized, the pattern requirement was intended to minimize the "danger" of application of RICO to persons not involved in

organized crime. *See supra* at 14. And it was understood by Congress that the reach of the RICO Title beyond organized crime would be at most "incidental." *See* 116 Cong. Rec. 18914 (1980) (remarks of Sen. McClellan); *id.* at 35344 (remarks of Rep. Poff).[6]

Since Congress' objective in adopting the pattern requirement was to minimize the application of RICO beyond organized crime, "relationship," as the Senate Report uses that term, is best understood as meaning a showing that the ongoing criminal conduct in question is the work of a group dedicated to the pervasive, self-reinforcing and self-perpetuating commission of offenses that constitute racketeering activity. *See supra* at 3-4.

Reading "pattern of racketeering activity" as we have suggested assures that any expansion of RICO beyond organized crime in its traditional sense would occur only when a group follows the operating procedures that Congress associated with recognized organized crime syndicates, and this reading is thus faithful to Congress' intent.[7]

While the Court has not yet had the occasion to construe the "pattern" requirement, Justice Powell did a first essay in his dissenting opinion in *Sedima*. His sum-

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[6] The same substantive provisions of RICO apply whether an action is civil or criminal in nature. The provision for a private civil RICO action received little attention during the legislative process. But the sponsor of the provision made clear that the target of such actions was organized crime. Thus, Rep. Steiger stated that the provision would afford a remedy to "the victims of organized crime" and "those of us who have been seriously affected by organized crime." 116 Cong. Rec. at 35347; House Hearings at 420 (statement of Rep. Steiger). *See also* 116 Cong. Rec. 35227 (1970) (remarks of Rep. Steiger).

[7] *See, e.g., United States v. Burns*, 683 F.2d 1056 (7th Cir. 1982), *cert. denied*, 459 U.S. 1173 (1983); *United States v. Lemm*, 680 F.2d 1193 (8th Cir. 1982), *cert. denied*, 459 U.S. 1110 (1983);

mary of that requirement correctly captures the role of "pattern of racketeering activity" in the RICO scheme, and thus bears repeating:

> "The 'pattern' element of the statute was designed to limit its application to planned, ongoing, continuing crime. . . . [Congress intended] to keep the reach of RICO focused directly on traditional organized crime and comparable ongoing criminal activities carried out in a structured, organized environment. The reach of the statute beyond traditional mobster and racketeer activity and comparable ongoing structured criminal enterprises was intended to be incidental, and only to the extent necessary to maintain the constitutionality of a statute aimed directly at organized crime." [473 U.S. at 526 (quoting Report of the Ad Hoc Civil RICO Task Force of the ABA Section of Corporation, Banking and Business Law 71-72 (1985)).]

• • • •

Congress in the pattern requirement made manifest its intention that RICO should apply only to organized crime or to groups having the characteristics that are the hallmarks of organized crime. That being so, the allegations in the complaint here are insufficient to charge Northwestern Bell or its officers and agents with engaging in a pattern of racketeering activity.[8]

United States v. Hartley, 678 F.2d 961 (11th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983); *United States v. Peacock*, 654 F.2d 339 (5th Cir. 1981), *modified on reh'g*, 686 F.2d 356 (1983), *cert. denied*, 464 U.S. 965 (1983).

[8] The "liberal construction" clause in RICO, which provides that "[t]he provisions of this title shall be liberally construed to effectuate its remedial purposes," Pub. L. No. 91-452, § 904(a), 84 Stat. 947, is of no aid to the plaintiffs here. The question in this case is not what the remedy should be for a proven RICO violation; rather, the question is whether Congress intended the conduct in question to be a violation of RICO. It would not "effectuate [Congress'] remedial purposes" to "liberal[ly] construe]" RICO to prohibit conduct that Congress did not intend RICO to prohibit. *See Sedima*, 473 U.S. at 491-92 n.10.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals for the Eighth Circuit in this case should be affirmed.

Respectfully submitted,

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No. 87-1252

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

H.J., INC., a Minnesota Corporation, KIRK DAHL, LARRY KRUGEN, and MARY KRUGEN, individually and d/b/a PHOTO IMAGES, SUSAN DAVIS, ROBERT NEAL, ISAAC H. WARD, RICHARD L. ANDERSON, THOMAS J. MOTT, and all others similarly situated,

Petitioners,

v.

NORTHWESTERN BELL TELEPHONE COMPANY, a subsidiary of U.S. WEST, A.B.C. individually and D.E.F. as corporations, and other unnamed co-conspirators,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF AMICUS CURIAE THE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-1252

H.J., INC., a Minnesota Corporation, KIRK DAHL, LARRY KRUGEN, and MARY KRUGEN, individually and d/b/a PHOTO IMAGES, SUSAN DAVIS, ROBERT NEAL, ISAAC H. WARD, RICHARD L. ANDERSON, THOMAS J. MOTT, and all others similarly situated,

Petitioners,

v.

NORTHWESTERN BELL TELEPHONE COMPANY, a subsidiary of U.S. WEST, A.B.C. individually and D.E.F. as corporations, and other unnamed co-conspirators,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF AMICUS CURIAE THE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

INTERESTS OF AMICUS CURIAE

The Washington Legal Foundation (WLF) is a non-profit, public interest law and policy center based in Washington, D.C. with 120,000 members nationwide.

WLF is committed to advancing the free enterprise system and to promoting the principles of judicial restraint. To this end, WLF has appeared as *amicus curiae* before this Court as well as other state and federal courts in cases affecting business. *See, e.g.*: *Tull v. United States*, 107 S.Ct. 1831 (1987); *Pacific Gas & Electric Company v. the Public Utilities Commission of California*, 106 S.Ct. 903 (1986); *Consolidated Edison Company of New York v. Public Service Commission of New York*, 100 S.Ct. 2326 (1980); and *Parklane Hosiery Company, Inc. v. Shore*, 99 S.Ct. 645 (1979). WLF has also had substantial experience litigating cases that present significant issues of statutory interpretation. *See, e.g., Patel v. Quality Inn South*, —— F.2d —— (11th Cir., June 8, 1988) (No. 87-7411) and *John A. Bersani, et al. v. U.S. Environmental Protection Agency, et al.*, —— F.2d —— (2d Cir., June 9, 1988) (Nos. 87-6275 and 87-6295).

WLF believes that this case would not have been filed at all, but for the fact that the Racketeer Influenced Corrupt Organizations Act of 1970 (RICO), which was intended to serve as a weapon against organized crime, has come to be used primarily—and inappropriately—as a weapon against legitimate businesses. Thus, WLF intends to argue that, in interpreting RICO's "pattern of racketeering" requirement, which is at issue here, this Court should confine the application of RICO to true racketeering, *i.e.*, to the types of situations that prompted Congress to enact RICO in the first place. WLF's experience with and understanding of the issues involved will provide this Court with a helpful, additional perspective for deciding this case.

WLF submits this brief on behalf of respondents with the written consent of both parties.

STATEMENT OF THE CASE

In the interests of judicial economy, *amicus* adopts by reference the statement of the case set forth by respondents.

SUMMARY OF ARGUMENT

Although this case presents the Court with an opportunity to examine the "pattern of racketeering" requirement of the Racketeer Influenced Corrupt Organizations Act (RICO) (18 U.S.C. §§ 1961-1968), no such examination will ultimately prove fruitful unless it is conducted in the context of RICO's anti-organized crime purposes. It is precisely because RICO's private enforcement provision [18 U.S.C. § 1964(c)] has become unmoored from this context that the instant case is before this Court at all.

The vast majority of private civil RICO suits are filed not against organized crime defendants, but against legitimate businessmen with whom the plaintiffs are having essentially commercial disputes. Consequently, despite Congress' indisputable intention that RICO serve as a weapon against organized crime, legitimate businessmen are being branded as "racketeers"; furthermore, the lower courts are straining—with contradictory and irreconcilable results—to interpret the pattern requirement in such a manner as to avoid this situation without gutting RICO's effectiveness against its intended targets.

No amount of tinkering with the pattern requirement is going to solve the problem. What is needed is a restatement by this Court of the reasons Congress enacted RICO in the first place. Respondents are entitled to have this Court give effect to Congress' intent that private civil RICO suits be limited to organized crime defendants.

ARGUMENT

THE DECISION BELOW SHOULD BE AFFIRMED UNDER ANY INTERPRETATION OF RICO'S "PATTERN OF RACKETEERING" REQUIREMENT.

In the instant case, this Court has agreed to examine the scope of 18 U.S.C. § 1961(5), which describes but does not precisely define "pattern of racketeering activity" under the Racketeer Influenced and Corrupt Organizations Act of 1970 (RICO) (18 U.S.C. §§ 1961-1968).[1] This provision has, of course, been the subject of intense debate as the lower courts struggle to construe it in such a way as to reach the organized criminal conduct that RICO was indisputably intended to attack, without simultaneously reaching the conduct of legitimate businesses—conduct that arguably falls within the letter, though certainly not the spirit, of the law.

As a result of this judicial balancing act, the pattern requirement has degenerated into a mishmash of contrived distinctions among "episodes," "schemes," and "transactions," distinctions that are nowhere mentioned in the statute itself and that admit of neither principled nor consistent application. The instant case presents this Court with an opportunity to unravel these tangled threads of statutory interpretation, and thereby lend a degree of settledness and predictability to what has become an increasingly chaotic area of the law.

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[1] In essence, RICO prohibits a person from investing in, acquiring, or conducting an enterprise through a pattern of racketeering activity (18 U.S.C. § 1962). A "pattern of racketeering activity" is defined in terms of what is required to prove it, *i.e.*, it "requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter [enacted October 15, 1970] and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity" [18 U.S.C. § 1961(5)]. "Racketeering activity" is defined in 18 U.S.C. § 1961(1).

Amicus will not be arguing for or against a particular Circuit's interpretation of the pattern requirement, nor will it be proposing its own interpretation of that requirement. Rather, *amicus* will show that *no* interpretation of the pattern requirement that might be adopted or devised by this Court will be a workable one unless RICO as a whole is construed in accordance with Congress' purpose in enacting it, *i.e.*, as a weapon against organized crime, not against legitimate businesses.

Had RICO been so construed when petitioners filed this suit, the case would have been dismissed not for failure to meet the pattern requirement, but on the grounds that it simply did not involve "organized crime" in the sense that Congress understood that term, and thus did not present the type of problem that RICO was designed to address. Absent such a construction of RICO now, the lower courts—regardless of this Court's interpretation of the pattern requirement—can be expected to continue their contradictory and makeshift efforts to keep the conduct of legitimate businesses from being improperly swept under the RICO umbrella.

A. Private Civil RICO [18 U.S.C. § 1964(c)] Was Not Intended To Apply To Legitimate Businesses And Businessmen Such As Respondents, Against Whom There Is No Allegation Of Involvement In Organized Crime.

The instant case involves a corporation's suit against a telephone company over the latter's alleged bribery of members of a state public utilities commission in order to obtain a rate increase. The case was brought under RICO's private action/treble damages provision, 18 U.S.C. § 1964(c).[2]

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[2] 18 U.S.C. § 1964(c) states that "Any person injured in his business or property by reason of a violation of section 1962 [Prohibited Activities] of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee."

In *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 105 S.Ct. 3275, 3277-8 (1985), this Court noted that "[t]he initial dormancy of this provision and its greatly increased utilization are now familiar history" (footnote omitted), and acknowledged the growing concern about private plaintiffs' "misuse of civil RICO" and about "the consequences of an unbridled reading of the statute . . ." (*id.* at 3278). More specifically, this Court recognized that, "in its private civil version, RICO is evolving into something quite different from the original conception of its enactors," *i.e.*, "private civil actions are being brought almost solely against [respected businesses], rather than against the archetypal, intimidating mobster" (*id.* at 3287). Nevertheless, this Court reasoned that

> The fact that § 1964(c) is used against respected businesses allegedly engaged in a pattern of specifically identified criminal conduct is hardly a sufficient reason for assuming that the provision is being misconstrued. . . . [T]his defect—if defect it is—is inherent in the statute as written, and its correction must lie with Congress.

Id.

Amicus does not here challenge the precise holding in *Sedima*—namely, that RICO does not limit private actions to situations where a defendant has already been convicted of a predicate act or of a RICO violation, and that RICO does not require a plaintiff in a private action to establish a "racketeering injury" as opposed to an injury resulting from the predicate acts themselves (*id.* at 3278). However, *amicus* respectfully submits that nothing in the statute requires this Court to lie paralyzed in the face of its own admitted "doubts . . . about [the] increasing divergence" of private civil RICO's expansive current applications "from the original conception of its enactors" (*id.* at 3287). Surely this Court does not exceed its constitutional powers when it interprets a statute in such a manner as to give effect to Congress' intent in

enacting that statute. To the contrary, it is precisely then that the Court is fulfilling its most obvious constitutional role.

To begin, private civil RICO can be understood solely in terms of RICO as a whole. This Court has recognized that Congress' "declared purpose" in enacting RICO was "to seek the eradication of organized crime in the United States." *See United States v. Turkette*, 101 S.Ct. 2524, 2532 (1981) (quoting the statement of findings prefacing the statute of which RICO forms Title IX, *i.e.*, The Organized Crime Control Act of 1970, Pub.L. No. 91-452, 84 Stat. 923) and *Russello v. United States*, 104 S.Ct. 296, 302-303 (1983). The very title of the statute bespeaks its purpose, with its explicit reference to organized crime and to those who perpetrate it, *i.e.*, racketeers; similarly, the conduct prohibited by RICO is *racketeering* activity [*see* 18 U.S.C. § 1961 ("Definitions") and § 1962 ("Prohibited Activities")].

That Congress regarded RICO as a weapon against organized crime, *i.e.*, as a means of protecting legitimate businesses *from* organized crime, is also clear from RICO's legislative history. Indeed, Senator McClellan, the chief sponsor of the bill that became the Organized Crime Control Act of 1970, premised his arguments for its passage on the notorious activities of "La Cosa Nostra,"[3] and on the fact that, when "organized crime moves into a business, it usually brings to that venture all the techniques of violence and intimidation which it used in its illegal businesses."[4]

Private civil RICO has the same anti-organized crime purpose as the larger statute of which it forms a part. This remedy was not contained in the Senate RICO bill, but was added by the House Judiciary Committee at the

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[3] 115 Cong. Rec. 5872-5875 (1969).

[4] S. Rep. No. 617, 91st Cong., 1st Sess. 77; 116 Cong. Rec. 591 (1970) (remarks of Senator McClellan).

urging of Representative Steiger, who argued that "[T]hose who have been wronged by organized crime should at least be given access to a legal remedy. In addition, the availability of such a remedy would enhance the effectiveness of Title IX's prohibitions." [5] In so arguing, Representative Steiger confirmed that the private civil remedy was fully consistent with the purpose of RICO, which was "to prevent and reverse the corrupt infiltration of legitimate commercial activities by ruthless organized criminals." [6] Without a conference, the Senate adopted the bill as amended in the House.[7] Senator McClellan described the private civil remedy as "a major new tool in extirpating the baneful influence of organized crime in our economic life." [8] In the context of the rest of the bill, however, he viewed it and the other House amendments as "comparatively . . . minor changes." [9]

In light of the original understanding of private civil RICO as a means of attacking organized crime, the extent to which it has deviated from that understanding in practice is almost unimaginable. Although they were the intended beneficiaries of this provision, legitimate businessmen now find themselves its target.

In a report issued in 1985, the American Bar Association's Civil RICO Task Force noted that, of the 270 RICO cases handled by the federal district courts as of that time, only nine per cent involved "allegations of criminal activity of a type generally associated with

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[5] Organized Crime Control: Hearings Before Subcommittee No. 5 of the Committee on the Judiciary on S. 30 and Related Proposals Relating to the Control of Organized Crime in the United States, 91st Cong., 2d Sess. 520 (1970).

[6] *Id.* at 519.

[7] 116 Cong. Rec. 36296 (1970).

[8] *Id.* at 25190.

[9] *Id.* at 36293.

professional criminals." [10] It has been noted that "RICO claims now are added as a matter of course in virtually all cases challenging securities transactions or alleging some type of commercial fraud. RICO also crops up in landlord-tenant and real estate disputes, attorney-client conflicts, employment grievances, and even divorce battles." [11] In one of its most extreme—and plainly unintended—applications to date, RICO served as the basis of a lawsuit filed by a leftist organization seeking $24 million in "damages" from 29 defendants allegedly involved in a bizarre conspiracy linking events from the Bay of Pigs invasion of Cuba, the Vietnam War, arms sales in the Middle East and Central America, assassinations, bombings, and drug smuggling by the world's major cocaine cartels.[12] The suit, which had gone on for over two years, was ruled utterly baseless and was finally dismissed last month by a Florida district court, though its effects will long be felt by both the taxpayers (court costs have been estimated at $2 million) and—most severely—by those defendants now facing financial ruin from legal fees and damage to their reputations.[13]

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[10] Report of the Ad Hoc Civil RICO Task Force of the ABA Section of Corporation, Banking, and Business Law (1985) at 55-58.

[11] Lacovara, Philip A. and Aronow, Geoffrey F., "The Legal Shakedown of Legitimate Business People: The Runaway Provisions of Private Civil RICO," 21 *New England L. Rev.* 1 (1985-1986) (citations omitted).

[12] *Avirgan, et al. v. Hull, et al.* (S.D. Fla., Civ. Act. No. 86-1146-CIV-KING) (June, 1988).

[13] *See* "Christic's Fairy Tale Lawsuit Called 'Legal Terrorism,'" *The Washington Times*, June 28, 1988.

In his response to one of the countless motions in the case, John K. Singlaub, one of the defendants, noted some of the disturbing implications of the ever-expanding, unauthorized uses of RICO: "The Christics claim that the expansionist interpretation of RICO should be further exacerbated by giving [them] the power and informant privilege of a governmental prosecutorial officer. This case is a clear example of why it should not. Here is a case with no

While this case is, of course, one of the more egregious examples of the abuse of RICO, it shows the degree to which RICO can, when unmoored from Congressional intent, become a means of waging "legal terrorism."

In short, private civil RICO has been blatantly and unjustifiably wrenched from its anti-organized crime context, and has become an irresistible lure for bounty hunters seeking treble damages and attorney's fees for grievances which, if valid, would be fully redressable under other federal and state laws. Clearly, RICO's application is governed not—as it should be—by Congressional intent, but rather by the ingenuity of private plaintiffs who would like nothing better than for this Court to endorse their lucrative efforts to sever RICO from the reasons behind its enactment. No canon of statutory construction requires such an anomalous result.

B. Respondents Are Entitled To Have This Court Give Effect To Congress' Intent That Private Civil RICO Suits Be Limited To Organized Crime Defendants.

At no time have petitioners contended that respondents are in any way involved in organized crime, as that term is commonly understood. Organized criminal activity, of course, is not necessarily organized crime within the meaning of RICO. *See THE IMPACT: Organized Crime*

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supporting evidence, with no legitimacy of any kind, filed by irresponsible, publicity-hungry lawyers. These lawyers answer to no one, are appointed by no duly-elected official, and yet anoint themselves as vigilantes riding the range of defamation and blasting away irreverently at the characters of honorable, decent men . . . . They call themselves 'private attorneys general' [and tell the public that they have] '. . . been granted broad legal authority under tough federal anti-crime statutes to subpoena documents and witnesses to prove an enterprise of racketeering activity reaching back 25 years . . . .' . . . These self-appointed 'private attorneys general' are out of control." Response of John K. Singlaub and Brief in Support Thereof in Opposition to Petition for Writ of Mandamus, etc. (Nov. 20, 1987), at 12-14.

Today, Report to the President and the Attorney General by the President's Commission on Organized Crime (April, 1986), at 19 ("Definition of Organized Crime"). Rather,

> Organized crime is the collective result of the commitment, knowledge, and actions of three components: the criminal groups, each of which has at its core persons tied by racial, linguistic, ethnic or other bonds; the protectors, persons who protect the group's interests; and specialist support, persons who knowingly render services on an *ad hoc* basis to enhance the group's interests.

Id. at 25. One of the hallmarks of the criminal group is "violence and the threat of violence," which

> are used as means of control and protection against both members of the group who violate their commitment and those outside the group to protect it and maximize its power. Members are expected to commit, condone, or authorize violent acts.
>
> Within organized crime, murder is commonplace when the interests of the organization are threatened. Violence can be utilized as a direct method of control to silence a potential witness or as an indirect method of control to punish as a warning to others.

Id. at 28-29. In light of these definitions, it is not surprising that petitioners make no attempt to argue that respondents constitute the type of target at which Congress was taking aim when it enacted RICO. Rather, petitioners' claim against respondents rests on the hope that this Court will abdicate its responsibility to construe RICO in accordance with its legislative purpose, *i.e.*, as a weapon against organized crime, not against legitimate business.

In *Sedima, supra*, 105 S.Ct. at 3286, this Court observed that "RICO is to be read broadly," in view of Congress' "express admonition that RICO is to 'be liberally construed to effectuate its remedial purposes,' Pub.

L. 91-452, § 904(a), 84 Stat. 947." However, the lawgiver's admonition to construe a statute liberally is surely not an invitation to rewrite it, which is precisely what a court is doing when it construes a statute in a manner at variance with the reasons for its enactment. If Congress intended RICO to be read broadly, that is because Congress' purpose in enacting RICO was to mount "a *broad* assault on *organized crime*." *Russello v. United States, supra*, 104 S.Ct. at 302 (emphasis added). [*See also, id.*: "The legislative history clearly demonstrates that the RICO statute was intended to provide new weapons of *unprecedented scope* for an assault upon *organized crime*" (emphasis added).] Nothing in Congress' directive that RICO be construed liberally suggests that Congress ever intended to reach the non-organized crime situation at issue here.

This is especially so given that the conduct petitioners have accused respondents of committing, *i.e.*, bribery under state and common law with the intention of obtaining a rate increase from a public utilities commission (petitioners' brief, hereinafter "P.B.," at 3-5), is fully redressable under that law, while the evils to which RICO is addressed are those that might go unremedied otherwise.[14] As this Court recognized in *United States v. Turquette, supra*, 101 S.Ct. at 2530,

> [T]he very purpose of the Organized Crime Control Act of 1970 was to enable the Federal Government to address a large and seemingly neglected problem. The view was that existing law, state and federal, was not adequate to address the problem [of organized crime], which was of national dimensions.

[14] It should be noted that state law has already acted to redress the wrongs alleged by petitioners. The Minnesota Public Utilities Commission has reconsidered respondents' 1984 telephone service rate order (which order petitioners claim was "tainted" by respondents), vacated it, and substantially reduced respondents' rates. *See Matter of Minnesota Public Utilities Commission*, 417 N.W.2d 274 (Minn. App. 1987).

Indeed, in the statement of findings that prefaces the Act, *supra* (84 Stat. 923), Congress specifically attributed the continuing growth of organized crime to the fact that "the sanctions and remedies available to the Government are unnecessarily limited in scope and impact."

While it is true that bribery, which petitioners allege here, is listed as a "Racketeering Activity" in 18 U.S.C. § 1961(1)(A), the reason for its inclusion was Congress' finding that it was "typical of the crimes committed by persons involved in organized crime. . . ." *United States v. Turquette, supra*, 101 S.Ct. at 2532. But not every alleged act of bribery has organized-crime implications; thus, not every alleged act of bribery can properly serve as a basis for a suit under private civil RICO. Although Congress, in enacting RICO, knew that "it would alter somewhat the role of the Federal Government in the war against organized crime and that the alteration would entail prosecutions involving acts of racketeering that are also crimes under state law" (*id.* at 2530-2531), the fact remains that this "alteration" was made in the context of "the war against organized crime." Where, as here, there is absolutely no suggestion that respondents are in any way affiliated with organized crime, a private civil RICO suit is entirely unwarranted.

The validity of this proposition is in no way undermined by the fact some Members of Congress had objected to § 1964(c) on the grounds that it "provided too easy a weapon against 'innocent businessmen' . . . and would be prone to abuse. . . ." *Sedima, supra*, 105 S.Ct. at 3286 (citations omitted). As Justice Powell argued in his *Sedima* dissent, Congress' enactment of the provision in the face of those concerns hardly shows

> that Congress *intended* those consequences to occur, particularly where, as here, there is compelling evidence to the contrary. The legislative history reveals

> that Congress did not state explicitly that the statute would reach only members of the Mafia because it believed there were constitutional problems with establishing such a specific status offense. . . . Nonetheless, the legislative history makes clear that the statute was intended to be *applied* to organized crime, and an influential sponsor of the bill emphasized that any effect it had beyond such crime was meant to be only incidental . . . (remarks of Senator McClellan).

Id. at 3288-3289 (Powell, J., dissenting) (emphasis in original; citations omitted). Indeed, given the obvious anti-organized crime purpose of the provision itself and of RICO as a whole, the supporters of the provision might well have deemed their opponents' fears so completely baseless as to warrant no further refinement of the statutory language.

It remains only to note that the fact that Congress has not yet accepted this Court's invitation to address itself specifically to the issue of private civil RICO's use "almost solely" against respected businesses as opposed to "mobsters" (*id.* at 3287) is not a legitimate basis for concluding that Congress either originally intended or, in any event, now approves of this situation. *See Aaron v. Securities and Exchange Commission*, 100 S.Ct. 1945, 1954 n.11 (1980). *Amicus* has already demonstrated that Congress' intent in enacting the provision was precisely the contrary. Moreover, as this Court has itself observed, "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *See Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 100 S.Ct. 2051, 2061 (1980).

As for treating the failure of subsequent Congresses to speak to this point as an indication of their acquiescence in the current state of affairs, suffice it to say that such an inference flies in the face of accepted canons of stautory construction, not to mention our system of checks and balances. Congress cannot constitutionally

legislate through inaction. *See Cleveland v. United States*, 67 S.Ct. 13, 17-18 (1946) (Rutledge, J., concurring, noting that "there are many reasons, other than to indicate approval of what the courts have done, why Congress may fail to take affirmative action to repudiate their misconstruction of its duly adopted laws. Among them may be the sheer pressure of other and more important business[,] . . . political considerations, . . . [a]nd . . . a strong and proper tendency to trust to the courts to correct their own errors") (citations omitted). Were Congress required to respond to judicial misapplications of its laws at the risk of being deemed to have accepted those misapplications, the role of the Executive in the legislative process could be bypassed, and the courts would in effect have paramount authority in the legislative realm.

In sum, there is no valid reason why this Court should fail to give effect to Congress' obvious intent that private civil RICO suits be limited to organized crime defendants.

C. A Proper Construction Of RICO's "Pattern Of Racketeering" Requirement Must Be Premised Upon RICO's Inapplicability To Non-Organized Crime Situations.

In their brief, petitioners discuss at length the various categories of "schemes," "episodes," and "transactions" that the lower federal courts have developed in their efforts to construe RICO's "pattern of racketeering" requirement. Not surprisingly, petitioners make no mention of the fact that these highly artificial and infinitely malleable constructions were crafted largely in response to the perceived problem—articulated or not—of unfairly branding legitimate businessmen as "racketeers" under a statute that was supposed to be a weapon against organized crime.

Until RICO and its private civil provision are confined to their anti-organized crime purposes, no amount

of judicial tinkering with the pattern requirement can be expected to rationalize this most irrational state of affairs. Indeed, it may even make things worse. *See* Statement of Deputy Assistant Attorney General John C. Keeney before the Subcommittee on Criminal Justice, Committee on the Judiciary, House of Representatives, Concerning RICO Legislation H.R. 2517 and H.R. 2943 (September 18, 1985) at 47 ("[T]he definition of 'pattern' should remain unaltered for criminal RICO. We have yet to see a redefinition which would not jeopardize our criminal enforcement efforts"). *See also* Letter from Assistant Attorney General John R. Bolton to Vice President George Bush (July 22, 1986) at 4 ("[C]hanges in the [pattern requirement] could also make it more difficult to obtain criminal convictions, while doing little to relieve federal courts of the burden of having to interpret and apply a general federal fraud remedy").

The threat that private civil RICO, as currently construed, poses to legitimate businesses cannot be overestimated. Precisely because this provision creates "private attorneys general" who, unlike their public counterparts, are under no obligation to exercise even a modicum of prosecutorial discretion before they file suit, this Court must be especially vigilant to insure that such cases are consistent with the anti-organized crime purposes of the statute. Such vigilance should lead this Court to reject petitioners' invitation simply to pick and choose among the lower courts' irreconcilable constructions of the pattern requirement, and should instead prompt an unequivocal restatement of Congress' unequivocal intent in enacting RICO.

CONCLUSION

For the foregoing reasons, the decision of the Eighth Circuit should be affirmed.

Respectfully submitted,

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